Supreme Court, U. S.
FILED
FEB 11 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1231

LINDEN LUMBER DIVISION, SUMMER & CO.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

AND

TRUCK DRIVERS UNION LOCAL NO. 413, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Linden Lumber Division, Summer & Co. (herein "Linden" or "the Company") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on September 13, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, pp. A1-A26) is not yet officially reported.[1] The decision and order of the National Labor Relations Board (App. F, pp. 33-51) is reported at 190 NLRB No. 116.

JURISDICTION

The opinion and judgment of the Court of Appeals for the District of Columbia Circuit (App. A and B, pp. A1-A27), reversing and remanding the order of the National Labor Relations Board, both issued on September 13, 1973. Thereafter, Linden moved to intervene in the proceeding[2] and to enlarge the time for filing a petition for rehearing. The Court granted these motions "in order that it [Linden] may have standing to seek rehearing and possibly certiorari . . ." (App. C, p. A30). Linden's timely motion for rehearing *en banc* was denied on November 6, 1973 (App. D, p. 31). Thereafter Linden, as well as the National Labor Relations Board and the petitioning unions below, each moved this Court for orders extending the time for filing respective petitions for writs of certiorari to February 10, 1974, which the Chief Justice granted in the instant case on December 20, 1973. (App. E, p. A32). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

1. In the court below this case was styled *Truck Drivers Union Local No. 413, International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America* v. *National Labor Relations Board*, No. 71-1529, and was consolidated with No. 72-1794, *Textile Workers Union of America* v. *National Labor Relations Board*.

2. Linden had been the respondent before the Board in No. 71-1529. Wilder Manufacturing Company, the respondent before the Board in No. 72-1794, did not participate in the Court of Appeals.

QUESTION PRESENTED

May an employer lawfully refuse to bargain with a union asserting to represent its employees where the union's majority status has not been established through the National Labor Relations Board's election processes and the employer has not interfered with such processes so as to preclude a fair election?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U. S. C. § 151, *et seq.* ("the Act") are set forth in Appendix I at pp. A91-A92.

STATEMENT OF THE CASE

This case presents a question, critical to the administration of the National Labor Relations Act, which was expressly left undecided by this Court in *N. L. R. B.* v. *Gissel Packing Company*, 395 U. S. 575, 595 n. 18 (1969), i.e., whether a compulsory bargaining order may be forced upon an employer who rejects a union's card-based bargaining demand ". . . and has insisted that the Union go to an election while at the same time refraining from committing unfair labor practices that would tend to disturb the 'laboratory conditions' of that election." This issue is presented to the Court upon an undisputed factual record.

Having obtained authorization cards from a majority of the Company's employees in an appropriate bargaining unit, the Union[3] demanded by letter dated January 3, 1967[4] that it

3. Truck Drivers Union Local No. 413, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

4. All dates hereafter refer to the year 1967 unless otherwise noted.

be recognized as the collective bargaining representative of these employees. On January 5, the Company responded by letter, stating that it doubted the Union's claimed majority status and suggesting that the Union petition the Board for an election. On January 6, the Union filed such a petition. In ensuing discussions to establish the details for an election, Linden declined to enter a consent election agreement or abide by the results of an election on the ground that the Union's organizational campaign had been improperly assisted by Company supervisors. The Company did, however, offer to enter into a consent agreement with the Union if it would submit a "fresh" showing of interest untainted by supervisory participation.

The Union voluntarily withdrew its election petition on February 3 and, on February 6, presented the Company with a renewed bargaining demand accompanied by an employee statement, prepared at a Union meeting attended by the very employees whose supervisory status was in dispute, reaffirming support for the Union. The Company declined this demand by letter dated February 8, asserting that the Union's purported membership was still improperly influenced by supervisors and that, in any event, as Linden had previously urged, the Union should prove its claim in a Board election. The Union, however, continued to spurn the Board's election processes and, instead, struck for recognition on February 15, 1967—a disruption to industrial peace which continued until June 1. Shortly after commencement of the strike, the Union filed the instant refusal to bargain charges against Linden. It is undisputed that the Company committed no unfair labor practices which interfered with the election atmosphere or otherwise precluded a fair election.[5]

5. At the conclusion of the strike, the Company refused to reinstate two employees it had contended were supervisors and, hence, unprotected by the Act. The Board found this to be an unfair labor practice; the Company thereupon reinstated the two employees and this issue was not presented to the court below.

The Board concluded that Linden ". . . should not be found guilty of a violation of Section 8(a)(5) [of the Act] solely on the basis of its refusal to accept evidence of majority status other than the results of a Board election." In reaching this conclusion, the Board expressly declined "to reenter the 'good faith' thicket . . . which we announced to the Supreme Court in *Gissel* we had 'virtually abandoned . . . altogether' . . ." (App. F, p. 41). In the Board's view, bargaining orders, in the absence of election interference, would be appropriate only where, in contrast to the present case, the Union's majority status had been proven by a "mutually acceptable and legally permissible means" (App. F, pp. A41-A42).

On petition for review, the Court of Appeals reversed. It noted that the present question had been left undecided in *Gissel* and that, in its opinion, the position adopted by the Board was "inconsistent with the Act." (App. A, pp. A13, n. 25 and A26). The Court, contrary to the Board, declared that an employer faced with a demonstration of union majority support cannot merely refrain from the commission of election interference; that a company confronted by such a situation must affirmatively "evidence good faith" and "resolve the possibility [of majority status] through a petition for an election." (App. A, p. A23). The Court remanded to the Board "to reconsider, what option, consistent with the statute, it wishes to follow." (App. A, p. A26).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Presents an Issue of Critical Importance in the Administration of the National Labor Relations Act Which Was Expressly Left Unanswered by This Court in Gissel

As this Court recognized in *Gissel*, the duty of an employer to recognize a union that predicates its recognition claim on asserted evidence of majority status other than the result of a valid Board election presents a significant question in the administration of the Act. *Gissel* partially resolved that issue by setting forth the controlling standards where the "preferred route" (395 U. S. at 602) of an election was precluded by employer unfair labor practices. Although *Gissel* did not criticize the Board's approach, announced at the oral argument of that case and followed in this case—that "the key to the issuance of bargaining order is the commission of serious unfair labor practices" and that an employer "can demand an election with a simple 'no comment' to the union" (395 U. S. at 594-595)—the Court expressly left undecided the question of "whether a bargaining order is ever appropriate in cases where there is no interference with the election processes" (395 U. S. at 595 and n. 18). That unanswered question is presented here.

Guidance by this Court as to the resolution of this significant, recurring problem is warranted. The Board in this case has articulated one rule to govern the propriety of bargaining orders in such a situation and the Court of Appeals another, far-different test. Since petitions for review may be filed in the District of Columbia Circuit under Section 10(f) of the Act by any person aggrieved by a final order of the Board, without limitations of venue, the disagreement between the

Board and the court below will necessarily result in a substantial dislocation in the national labor policy. Cf., e.g., *N. L. R. B.* v. *Meat Cutters Local 347, Food Store Employees Union*, 476 F. 2d 546 (D. C. Cir. 1973), *cert. granted*, No. 73-370 (Dec. 3, 1973);[6] and *International Brotherhood of Electrical Workers* v. *N. L. R. B.*, ... F. 2d ..... (D. C. Cir. 1973), *cert. granted*, Nos. 73-556 and 595 (Jan. 21, 1974). This dislocation is particularly disturbing since it may arise, or at least influence, every union recognitional demand. This Court should, by granting this petition and the petitions that the Board and Union have indicated they intend to file herein, remove this undesirable impediment to the orderly administration of the Act.

2. The Decision Below Is Inconsistent with Gissel and the Act Itself

The entire thrust of *Gissel* is to affirm the inapplicability of any inquiry into an employer's subjective motivation in assessing the propriety of a bargaining order.[7] The decision below, however, now resurrects the very "good faith doubt" test which

6. Unlike *Food Store Employees*, where the central issue concerned the extent of a reviewing court's remedial authority *vis-a-vis* that of the Board (see brief of the Board in No. 73-370, pp. 2, 10, 12-15, 27-29), this case involves an irreconcilable disagreement between the Board and the Court of Appeals over the interpretation of one of the Act's fundamental provisions.

7. For example, in disarming the asserted dilemma that employers would violate the Act by investigating a union's claimed majority support, or if they failed to undertake such an investigation, be accused of a lack of a "good faith doubt" of a claimed majority status, this Court reiterated:

> As we have pointed out, however, an employer is not obligated to accept a card check as proof of majority status, under the Board's current practice, and he is not required to justify his insistence on an election by making his own investigation of employee sentiment and showing affirmative reasons for doubting the majority status. [395 U. S. at 609].

Gissel had presumably finally laid to rest.[8] It adopts, in effect, the union position in *Gissel*, that "an employer, when confronted with a card-based bargaining demand, can insist on an election only by filing the election petition himself . . . and not by insisting that the Union file the election petition", which this Court expressly left undecided. 395 U. S. at 594-595.[9]

Imposing upon employers an affirmative obligation, of either filing an election petition, or otherwise making an affirmative showing of the reasons for entertaining a doubt as to a union's asserted majority status, also directly conflicts with several basic policies of the Act:

> *First*, Section 9(c)(1)(B) of the Act merely *permits* an employer to file an election petition; it in no way *requires* that a petition be filed in order "to test . . . good

8. The demise of the "good faith doubt" test came as no surprise by the time *Gissel* was decided. It was heralded in *Aaron Brothers*, 158 NLRB 1077 (1966), where the Board shifted the burden of proving an employer's bad faith to the General Counsel In effect, an employer who did not commit any pre-election unfair labor practices was assumed not to have acted in bad faith, and, hence, no bargaining order issued. As it became plainly obvious that "good faith doubt" was mere rubric, and that the real inquiry was whether utilization of the election process was tainted by employer unfair labor practices, criticism of the "good faith doubt" standard mounted. See, e.g., *N. L. R. B.* v. *River Togs, Inc.*, 382 F. 2d 198, 206-208 (2nd Cir 1967). And finally, in *Gissel*, the doctrine was "abandoned . . . altogether." 395 U. S. at 594. See also *General Steel Products, Inc.* v. *N. L. R. B.*, 445 F. 2d 1350 (4th Cir. 1971), and the Board's decision on remand, 199 NLRB No. 121 (1972).

9. Indeed, *Gissel* expressly contemplated "category III" situations, i.e., cases involving "minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order" (395 U. S. at 615). Anomalously, under the lower court's decision, the employer who commits no unfair labor practice is apparently *more* vulnerable to a bargaining order than is the employer who commits such "category III" unfair labor practices. Further, the unreliability of authorization cards as the basis for recognition in a third category situation is surely a subject of even more concern where, as here, there are no election-polluting unfair labor practices.

> faith" (App. A, p. 26). In fact, by conditioning the filing of an employer petition on a prior request to bargain, Section 9(c)(1)(B) sought to insure that employers would not prematurely force an election during the nascent stages of a union organizational campaign and thus pretermit that campaign.[10] The policies underlying Section 9(c)(1)(B), accordingly, "fully support", rather than negate, the Board policy of permitting an employer to "insist on a secret ballot election, unless . . . he engages in contemporaneous unfair labor practices likely to . . . seriously impede the election." *Gissel*, 395 U. S. at 599-600.
>
> *Second*, an employer's right under Section 8(c) of the Act and the First Amendment "to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *Gissel*, 395 U. S. at 615. It was, in fact, this desire to permit a full exposure of opposing views that, at least in part, motivated the Board to "no longer require . . . an employer to show affirmative reasons for insisting on an election . . ." *Ibid.* To force an employer to petition for an election, however, as the decision below would do, while a union is at the pinnacle of its strength after a long and frequently clandestine one-side organizational drive, or during a coercive recognitional strike, would effectively vitiate this right of free speech.
>
> *Third*, forcing an employer to petition for election also frees a union seeking recognition from two requirements otherwise imposed by the Act. Under Section 9(c)(1)(A), union-filed petitions must have a valid and sufficient showing of employee interest to warrant further proceedings. See *Gissel*, 395 U. S. at 607. An employer petition, on the other hand, need not be supported by any interest showing and may, as a result, indirectly cure

10. See, e.g., Senate Report No. 105, pp. 11, 25 (1947), I Leg. Hist. of the Labor Management Relations Act ("I Leg. Hist."), pp. 417, 431; and House Report No. 245, 80th Cong. 1st Sess., 35, 93 Cong. Rec. 3954 (1947), I Leg. Hist., p. 326.

any defects, such as the supervisory participation in card solicitation in the instant case, which would preclude the union from filing a proper petition. Additionally, a mandatory petition obligation also places the employer at a substantial tactical disadvantage; he must both initially select the appropriate bargaining unit and establish an election date prior to exercising his "legal right . . . to try to persuade [his] employees, including those who had signed cards, to disavow the union". *N. L. R. B.* v. *Drives, Incorporated*, 440 F. 2d 354, 364 (7th Cir. 1971).

And finally, the decision below, contrary to the Congressional intent evidenced by Section 8(b)(7) of the Act, encourages union recognitional strikes. The Court of Appeals thus indicated that while a recognitional strike standing alone does not necessarily constitute "convincing evidence of majority support," it nevertheless creates, even in the absence of a union card majority, "sufficient probability of majority support as to require an employer asserting a doubted majority status to resolve the possibility through a petition for an election . . ." (App. A, p. A23).

The decision below, in sum, would significantly alter, admittedly without a "clear cut" directive "in either the text of the statute or the legislative history" (App. A, p. A14), the present policies and structure of the Act. Review by this Court to determine the propriety of these alterations is, therefore, necessary.

CONCLUSION

For the foregoing reasons, Linden Lumber Division, Summer & Co., respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 71-1529

TRUCK DRIVERS UNION LOCAL NO. 413, ETC., ET AL.,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD.

No. 72-1794

TEXTILE WORKERS UNION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondents.

Petitions for Review of Orders of
the National Labor Relations Board

Decided September 13, 1973

Laurence Gold for petitioners. *Sidney Dickstein* and *Thomas F. Phalen, Jr.* were on the brief for petitioner in No. 71-1529.

Patricia Eames, J. Albert Woll and *Thomas E. Harris* were on the brief for petitioner in No. 72-1794.

Stanley R. Zirkin, Attorney, National Labor Relations Board with whom *Marcel Mallet-Prevost,* Assistant General Counsel at the time the brief was filed, and *Robert A. Giannasi,* Attorney, National Labor Relations Board were on the brief, for respondent.

Before: LEVENTHAL and ROBB, *Circuit Judges* and JAMESON,* *Senior United States District Judge* for the District of Montana.

Opinion for the Court filed by *Circuit Judge* LEVENTHAL.

LEVENTHAL, *Circuit Judge:* These consolidated appeals raise the question of the scope of an employer's duty to bargain, under Section 8(a)(5) of the National Labor Relations Act, on the basis of authorization cards obtained by the union, in light of NLRB v. Gissel Packing Co., 395 U. S. 575 (1969). The cases require review of two orders of the National Labor Relations Board. The factual settings are closely related. We shall set out the background in each case before considering the pertinent legal principles.[1]

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* Sitting by designation pursuant to 28 U. S. C. § 294(d).

1. No. 71-1529 is before the court on petition of Truck Drivers Union Local No. 413 (Truck Drivers) affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, to set aside a Board decision refusing to order Linden Lumber Division, Summer & Co., ("Linden") to bargain with the union, 190 NLRB No. 116, June 7, 1971.

No. 72-1794 is before the court on petition of Textile Workers Union of America to review the Board's Second Supplemental Decision and Order, refusing to issue a bargaining order directed against Wilder Manufacturing Co., August 21, 1972, reported at 198 NLRB No. 123.

All parties agree that the Board's finding of facts are supported by substantial evidence. Accordingly, we rely for our statement of facts on the decisions of the Board, 173 NLRB No. 30 (1968), 185 NLRB No. 76 (1970), (Wilder); 190 NLRB No. 116 (Linden Lumber Division, Summer & Co.), and the trial examiner's decisions as adopted.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. *Wilder Manufacturing Co.*

On the morning of October 12, 1965, representatives of the Textile Workers presented Walter Derse, secretary and general manager of Wilder, with 11 signed and two unsigned union membership cards[2] and requested recognition as bargaining agent of the Company's production and maintenance employees. Of the 30 employees then on the Company's payroll, 18 were in the production and maintenance unit, which the Board found to be appropriate for purposes of collective bargaining.[3] Failing to receive an immediate answer to the request, the eleven employees who had signed the authorization cards left the plant and established a picket line. They were joined the

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2. The cards were signed at the home of William Hissam, a representative of the Union, on the evening of October 11. The card contained the following language:

> "I hereby accept membership in the Textile Workers Union of America of my own free will and do hereby designate said [Union] as my representative for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment." (JA at 11.)

3. In the amended complaint, the General Counsel alleged that the appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act is "All production and maintenance employees of Respondents, employed at its Port Jarvis plant, exclusive of draftsmen, office clericals, plant clericals, guards, watchmen, professional employees and all supervisors as defined in Section 2(11) of the Act." (JA at 12.)

By consent of all parties 18 employees were included in a unit of production and maintenance employees. The General Counsel and the company disagreed as to whether seven additional employees should be included in that unit. The Trial Examiner found that two of the contested employees were supervisors, and that the other five employees lacked "a community interest" with the production and maintenance employees. (JA at 12-17).

next day by the two employees whose blank cards were among the thirteen presented to Derse.[4]

During the evening of the next day, October 13, the Company's officers met. Walter Derse reported that there were ten or eleven employees on the picket line and as "we are about 30 (not including the officers of the Company) it appears that they do not represent a majority." The officers decided not to recognize the union.[5] The picketing continued for at least five months thereafter. Subsequent demands for recognition were made without response from the Company.

On May 9, 1966, the Board's General Counsel filed a complaint charging Wilder with violations of § 8(a)(1) and (5) of the Act.[6] The Trial Examiner, on September 22, 1966, upheld the complaint on the § 8(a)(5) and dismissed the 8(a)(1) charge.[7] The Board, however, concluded that the 8(a)(5)

4. As the Trial Examiner noted, as the company's proposed unit was 25 employees, "it is apparent that the Union on October 12, 1965, held valid authorization cards (13 in number) for the majority of the employees in such unit."

5. As reported by the Trial Examiner, Derse included all the employees in the thirty

> "because . . . what Mr. Cohen [a union representative] told me was that they represented a majority of our employees." . . . [T]he Trial Examiner has found that the Union requested representation in a production and maintenance unit thus there was no basis for Derse's assertion that the Union desired to represent all thirty employees. Moreover, the Trial Examiner is not convinced that Derse was so unschooled in labor matters as to believe that the Union was seeking to represent Plant Manager Mr. Carlin, Supervisor DeGraw, or the office clerical employees whom the employer conceded should be excluded from the appropriate unit. Furthermore at the time Derse's remarks were claimed to have been made, he was aware that only production and maintenance employees had joined the strike. (JA at 19 n. 35).

6. As to the 8(a)(1) charge, the complaint alleged that certain statements by a supervisor violated the § 7 rights of Wilder employees. This unfair labor practice charge is not before the court.

7. The designation of the valid 8(a)(1) charge was only in connection with the failure to bargain under 8(a)(5), thus not constituting an independent unfair labor practice.

charge should be dismissed since "there is no showing whatsoever that Respondent had rejected the collective-bargaining principle or engaged in any interference, restraint, or coercion of employees to undermine the Union. Nor does the record show that Respondent has engaged in any other conduct which would prevent the holding of a fair election."[8] On petition for review to this court, we held per curiam, 137 U. S. App. D. C. 67, 420 F. 2d 635 (Nov. 14, 1969), that in light of the intervening *Gissel* decision, *supra*, and possible conflicts between the "current practice" of the Board, as represented to the Supreme Court, and the decision reached, the case should be remanded for "further consideration by the Board in the first instance in light of *Gissel*, but without limitation."[9]

On August 27, 1970, 185 NLRB 175, the Board issued a Supplemental Decision and Order, after a review of the entire record, and now found that Wilder's course of conduct did constitute a violation of § 8(a)(5). In reaching this result the Board declined to rest on a finding that the case presented an employer who refused to bargain and "stands upon his doubt

8. In so holding the Board acknowledged that proof of "bad faith" would be a basis of a valid 8(a)(5) violation, but equated this with evidence that the "Employer has completely rejected the collective-bargaining principle or seeks to gain time within which to unlawfully undermine the Union and dissipate its majority." (J. A. at 6).

9. 137 U. S. App. D. C. at 68, 420 F. 2d at 636. The court noted specifically that the defense advanced by the employer, that it did not think the cards presented to it represented a majority of the appropriate unit, seemed inconsistent with the Board's position in *Gissel*, where the Board represented to the Court at oral argument that "an employer could not refuse recognition initially because of questions as to the appropriateness of the unit." 395 U. S. at 594. Judge Fahy, concurring separately in the per curiam, stated (137 U. S. App. D. C. at 70, 420 F. 2d at 638):

> The present record reveals that the Union representatives had authorization cards free of suspicion from a majority in a unit recognized as appropriate by the trial examiner and the Board, followed by evidence of the majority's solidarity through the picketing and strike. Moreover, the employer did not demand that the Union request a Board election.

as to the appropriateness of the unit," stating that "the Respondents' response—or lack of response—to the Union demand did not assert this as the ground of the refusal . . . ."[10] Instead the Board focused on these findings: (1) There was evidence, in addition to mere cards, sufficient to communicate to the employer convincing knowledge of majority status (the independent knowledge test). (2) The evidence was insufficient to show that the employer's refusal to grant recognition was based upon genuine willingness to resolve any doubts concerning majority status through the Board's election process. On finding both these conditions met, the Board concluded that the refusal to bargain constituted a violation of 8(a)(5).[11] The Board then

10. The Board, in note 4 of its supplemental decision, stated:

> "The Respondents did later contend before this Board that certain additional employees should be added to the Union's proposed unit. We have, however, in other cases been required to resolve such unit questions in 8(a)(5) cases and, upon making a finding of appropriate unit, then proceeded to direct the respondent to bargain in the unit ultimately found appropriate. . . . Generally, of course, any such doubts are best resolved in the course of representation case procedures which any party is free to invoke. As we note *infra*, the Respondents here made no attempt to resolve any doubts as to appropriateness of unit by this method." (JA 34).

11. The Board attributed "independent knowledge" to the employer on the basis of (a) 11 of 18 production and maintenance employees had signed cards, (b) all of the card signers went on strike, and (c) "an officer of the Respondent conceded in his testimony that he told his fellow officers that the Union 'had 10 or 11' of the employees." (JA at 35).

As to the second condition, the Board noted that "the Employer did not itself file an election petition or urge or even suggest to the employees or the Union the use of such procedures." (JA at 35). Also the Board rejected Respondent's contention that the provisions of 8(b)(7)(c) supported its position that an election was required because picketing for recognition is unlawful if "conducted without a petition under Section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing." The Board relied on Blinne Construction Company, 135 NLRB 1153 (1962) as rejecting that construction of the statute where a union strikes and pickets against an employer's unlawful refusal to recognize it and meritorious 8(a)(5) charges have been filed. (JA 37).

filed an application for enforcement of its supplemental order in this court on September 21, 1970. While the petition was pending, the Company moved to dismiss this petition on jurisdictional grounds, and subsequently the Board moved to have the case remanded to it for reconsideration in light of its decision in *Linden Lumber*, 190 NLRB No. 116, 77 LRRM 1305 which issued on June 7, 1971 and is the companion case in this litigation. Our court upheld the jurisdictional objections of the company and transferred the case to the Second Circuit,[12] which on February 1, 1972, remanded to the Board for the requested reconsideration.[13]

The Board on August 21, 1972, 198 NLRB No. 123, then issued its Second Supplemental Decision and Order in *Wilder* which reversed the First Supplemental Decision and Order. The Board, one member dissenting, rejected the "independent knowledge" test and held that absent voluntary measures by the employer, through an attempt[14] or agreement[15] to determine majority status by any means other than a Board election, and in the absence of any independent unfair labor practices, the predicate could not be established for an 8(a)(5) violation.[16]

12. . . . . U. S. App. D. C. . . . . , 454 F. 2d 595 (1971).

13. JA at 104.

14. Citing Nation-wide Plastics, 197 NLRB No. 136 (1972).

15. Citing Snow & Sons, 134 NLRB 709, enf'd 308 F. 2d 687 (9th Cir. 1962).

16. The Board was of the view that no workable standard could be developed to evaluate whether an employer "knows" or "doubts" majority status, nor would it determine the "willingness" of the employer to have majority status determined by the election process. Moreover, the Board emphasized the "preferred status" of the election process. It concluded:

> We think it far better, by making clear here, as we did in *Linden*, that the proper course in such cases is for the union, on behalf of the employees, to invoke our election processes. In that manner, if there is indeed majority support, it will be evidenced in clear and unmistakable fashion within a matter of a few weeks. Surely this is a far better basis for the bargaining relationship than a decision in litigation which would take us nearly a year to reach and which, even then, may be subject to debate as to the soundness of its evidentiary base and to further contest in the courts. (JA at 110).

After over 7 years, and three Board decisions representing a series of reversals in position, the Board now seeks to limit sharply the scope of any duty to bargain on the basis of authorization cards.

B. *Linden Lumber*

The procedural history of *Linden Lumber* is shorter—there is only one Board decision—but pointed, for it is on the basis of the Board's decision in this case, issued June 7, 1971, that the decision in *Wilder* rests. The time elapsed since the underlying events, however, is more than six years.

On December 28, 1966, employee Martin contacted Local 413 representative Dow Norman about organizing the employees of Linden Lumber (the Company). Next day, Norman held a meeting during which 12 employees, including 2 alleged supervisors, Shafer and Marsh, signed authorization cards. In the proceeding before the Trial Examiner, "the parties stipulated that at all times material there were 10 employees" within the appropriate bargaining unit.[17] On January 5, 1967, Local 413 ("the Union") sent a letter to the Company requesting recognition. On February 3, at a prehearing conference on the Local's representation petition, the Company declined the Union's request to enter a consent election agreement. Instead the Company raised threshold questions as to the Union's showing of

17. There was agreement that the following unit was appropriate within the meaning of Section 9(b) of the Act:

> All truck drivers, warehousemen, production and maintenance employees and yardmen . . . excluding office clerical employees, guards and supervisors. (JA at 73).

Initially there was a dispute over the inclusion of three alleged supervisors in the unit, but the parties agreed that one, a Mr. Toops, was a supervisor. As to Marsh, the trial examiner found he was not a supervisor. Since Shafer resigned on February 6, 1965, the Trial Examiner determined it was unnecessary to decide whether he was, in fact, a supervisor. (JA at 73-74).

Thus, the Examiner determined there were 11 legitimate employees in the actual unit. Eliminating the vote of Shafer, every member of the appropriate unit signed an authorization card.

interest, on the basis that the union had been organized by supervisors (Marsh and Shafer).[18] Based upon the Company's alleged fear of recognizing a supervisor-dominated union, the Company stated that unless it could settle the 8(a)(2) violation in the context of the petition for an election—a request refused by the hearing officer—it would refuse to recognize the union, even after a Board-conducted election.[19] Immediately after this statement by the representative of the Company (Mr. Rector), the Union's representatives withdrew the representation petition.[20] After the withdrawal was approved, Rector told Mr. Smedstad, the Union attorney, that if the Union submitted a new petition supported by a "fresh" 30 percent showing of interest, the Company would go to a consent election. By March 4, the Union had obtained 9 signatures (leaving out the alleged supervisors, Shafer and Marsh). The Company still refused to recognize the Union "because its membership included supervisors who influenced employees," again raising the spectre of the 8(a)(2) violation.

On February 15, the employees struck in support of the Union demand for recognition.[21] The Union filed its charge of refusal

18. The employer had reference to a possible 8(a)(2) violation which prescribes employer domination of unions.

19. The Hearing Officer ruled that Linden's claim of supervisory influence in organization of Local 413 related to the Union's administrative showing of interest (Board Rule 101.18) and could not be litigated at a representation hearing. (See JA at 46).

The Trial Examiner subsequently found, in the hearing on the 8(a)(5) charge, that in fact there were no supervisors in the bargaining unit.

20. The Trial Examiner found, on the basis of cross-examination of the union's counsel, that this was done to avoid two years of litigation. The sequence, of course, would be the order of an election; if the union wins, the employer resists recognition; the General Counsel brings an 8(a)(5) violation. The union sought to short-circuit this proceeding by moving directly to an 8(a)(5) proceeding, a strategy facilitated by the complaint of the General Counsel. Obviously the union attorney did not anticipate, nor could he, that the question of recognition would still be unsettled in 1973.

21. Initially, Marsh did not join the strike on union instructions because his status as a supervisor was in question. On February 27, Marsh ceased work, apparently joining the strikers.

to bargain on February 23, and the strike ended on June 1. At the end of the strike the Company refused to reinstate Marsh and another striker, Alexander. Marsh was refused reinstatement on the ground that he had quit. Alexander was refused on the strength of the Company's belief that he had provoked and participated in a violent incident related to the picketing at the plant.

On these facts, the Trial Examiner concluded that the Company violated Section 8(a)(5) by refusing to recognize the Union, that the strike was an unfair labor practice strike, and that Marsh and Alexander were unlawfully denied reinstatement in violation of Section 8(a)(3).

The Board concluded that Marsh and Alexander, as economic strikers, were wrongfully denied reinstatement in violation of Section 8(a)(3). It further determined, two members dissenting, to reject the Examiner's conclusion, and held that the Company did not violate § 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

The Board majority began its analysis by noting that the § 8(a)(3) violation did not amount to a serious independent unfair labor practice, and that it could not make a finding that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order. . . ." (*Gissel, supra,* at 614-15). This conclusion is not challenged in this petition for review.

Noting that *Gissel* left open "whether, absent election interference, an employer who insists on an election must initiate the election by his own petition," the Board reviewed the "current practice" on this question alluded to in *Gissel*.[22] The Board

22. The Court stated, 395 U. S. at 594:

> Under the Board's current practice, an employer's good faith doubt is largely irrelevant, and the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election process and tend to preclude the holding of a fair election. Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple 'no comment' to the union. The Board pointed out, however, (1) that an employer could not refuse to bargain if he *knew*, through a personal poll for instance, that a majority of his employees supported the union, and (2) that an employer could not refuse recognition initially because of questions as to the appropriateness of the unit and then later claim, as an after-thought, that he doubted the union's strength.

then questioned whether the Supreme Court summary "is entirely accurate," particularly whether the Board had ever used the "independent knowledge" test as a basis for a bargaining order. It stated that *Snow & Sons*, 134 NLRB 709, *enf'd*, 308 F. 2d 687 (9th Cir. 1962) did not rest only on the fact of employer *knowledge*, but "also upon the fact that the employer breached his agreement to permit majority status to be determined by means other than a Board election." The Board also distinguished its decision in *Wilder*,[23] observing "[t]here we found an 8(a)(5) violation not only because of admitted employer knowledge of majority status, but also because of the absence of any evidence that the employer was willing to resolve any lingering doubts of majority status through our election procedures." The Board then argued that the "independent knowledge" test was unworkable, and also questioned how it could determine the "willingness" to have majority status determined by an election. The Board stated, "how are we to judge 'willingness' if the record is silent, as in *Wilder*, or doubtful, as here, as to just how 'willing' the Respondent is in fact? We decline, in summary to re-enter the 'good faith' thicket of *Joy Silk*. . . ."[24] The Board indicated that it intended to restrict the scope of § 8(a)(5) to those situations in which the company

23. At this time, the second Board decision, finding an 8(a)(5) violation, was in effect.

24. Joy Silk Mills, Inc., 85 NLRB 1263, enf'd as modified 185 F. 2d 732 (D. C. Cir. 1950).

and union had "voluntarily" agreed "upon [a] mutually acceptable and legally permissible means, other than a Board-conducted election, for resolving the issue of union majority status."

C. *Contentions of the Parties*

The petitioner unions contend that the language and history of §§ 8(a)(5) and 9(a), and subsequent court decisions, establish that an employer has a duty to bargain whenever the union representative presents "convincing evidence of majority support,"that this requires an evaluation of whether "a reasonable man" would consider any particular evidence convincing, and that such convincing evidence was supplied in the instant cases by the recognitional strikes, joined by a majority of their employees. They submit that retention of an independent knowledge test is not inherently unworkable, at least when knowledge is determined on the basis of a recognitional strike.

The Board, on the other hand, has adopted a "voluntarist" view of the duty to bargain. Absent unfair labor practices or an agreement to determine majority status through means other than an election, such as a poll, the employer has no duty to recognize the union. This means, in effect, that as a matter of law, the decision to recognize a union on the basis of cards is entirely within the control of the employer; neither "bad faith" or "independent knowledge" can lay the predicate for recognition because those concepts are deemed unworkable.

II. THE STATUTORY FRAMEWORK

While there is certainly wide latitude for Board policy in enterpreting the requirements of statutory obligations. "The policy of Congress . . . cannot be defeated by the Board's policy," Machinists Local 1424, 362 U. S. 411, 429 (1960). We therefore begin with a brief examination of the legislative materials.

Section 9(a) provides that: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees . . ." Section 8(a)(5) then provides that it shall be an unfair labor practice for an employer "(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." *Gissel*, aside from its specific holdings,[25] is important in recognizing that:[26]

> Since § 9(a) . . . refers to the representative as the one "designated or selected" by a majority of the employees without specifying precisely how that representative is to be chosen, it was early recognized that an employer had a duty to bargain whenever the union representative presented "convincing evidence of majority support."

The view that an election was not the only predicate for a union claim to majority status is given added emphasis by the Conference Committee rejection of that proposal when the basic Act was under revision in 1947. The House version of § 8(a)(5) would have made a refusal to bargain an unfair labor practice only if the union were already certified under § 9(a). This was rejected in favor of the broader Senate version.[27] The language was not changed as the House proposed, even though, as *Gissel* points out, it had been early recognized, by interpretation of the outstanding law, that the employer had a duty to bargain whenever the union representative presented convincing evidence of majority support.

25. The Supreme Court left open the issue presented in the instant cases, 395 U. S. at 595 and 601 n. 18.

26. 395 U. S. at 596.

27. *See* H. R. 3020, 80th Cong., 1st Sess. (1947) (House Bill). The Conference Report, H. R. Rep. No. 510, 80th Cong., 1st Sess. 41 (1947) stated: "The conference agreement . . . follows the provisions of existing law . . . in the case of section 8(5) . . . which makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 9(a)."

What Congress did do in 1947 was to add a provision, in § 9(c)(1)(B), to give employers the right to file their own representation petitions. It provides:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board— . . .
>
> > (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.

These statutory provisions plainly contemplate employer duty of recognition even in the absence of election, and give a safeguard to the employer who has doubts about majority status by assuring him the right to file his own petition for an election. There is no clear cut answer, however, either in the text of the statute or the legislative history, to the question of when and in what circumstances an employer must take evidence of majority support as "convincing." That is the focal issue of these cases.

III. STANDARDS FOR CARD RECOGNITION

In approaching the question of a possible standard for card recognition, we must begin by recognizing that "cards are not the functional equivalent of a certification election,"[28] and elections have a "preferred status" as a means of determining representation.[29] Three reasons are primary in the Board's

28. Comment, Employer Recognition of Unions on the Basis of Authorization Cards: the "Independent Knowledge" Standard, 39 U. Chi. L. Rev. 314, 318 (1972).

29. The Court in *Gissel* noted that "secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." 395 U. S. at 602.

conclusion that cards do not have the same standing as certification election. (1) There is a greater opportunity for coercion of employees by union organizers, as compared with a secret ballot.[30] (2) Arguably, employees may misunderstand the import of signing an authorization card, because of misreading, failure to read, or union misrepresentation.[31] (3) When cards are used, the employer has no opportunity to speak to his employees concerning their determination to have union representation, and an employers' right to communicate to employees concerning representation is arguably guaranteed under § 8(c) of the Taft-Hartley Act.[32] Out of these considerations arises an inhibition on the part of the Board to expand the mandatory scope of a duty to bargain on the basis of cards.

A. *The Independent Knowledge Standard*

Prior to the present litigation, the Board implemented the policy favoring elections over cards by adopting a limited scope for a duty to bargain in the absence of election. The rule adopted by the Board has been described as the "independent knowledge" standard.[33]

This rule developed from the case of *Snow & Sons*[34] where the employer, upon being presented with an apparent card

30. Comment, *Refusal-to-Recognize Charges Under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice*, 33 U. Chi. L. Rev. 387, 390 (1966). While this argument certainly has force on its face, its force is presumably subject to discount for the ability of union organizers to effectively influence votes in election campaigns.

31. *See* Note, *Union Authorization Cards*, 75 Yale L. J. 805, 823; Cf. Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 Mich. L. Rev. 851 (1967).

32. Courts have protected the employer's right to influence the vote of his employees through non-coercive speech. *See* Thomas v. Collins, 323 U. S. 516, 537-38 (1945); NLRB v. Virginia Elec. & Power Co., 314 U. S. 469 (1941); Suprenant Mfg. Co. v. NLRB, 341 F. 2d 756 (6th Cir. 1965).

33. Comment, note 28 *supra*, at 319.

34. 134 NLRB 709 (1961), *enforced*, 308 F. 2d 687 (9th Cir. 1962).

majority, at first refused to recognize the union and insisted that it petition for an election. Subsequently, the employer agreed to submit the cards to an impartial third party, but after authentication, the employer refused recognition claiming he never considered the agreement binding. The Board held that, given the authentication, the refusal to bargain was not based on a reasonable doubt as to the union's majority. During the 1960's the *Snow & Sons* doctrine was applied where an employer had reneged on an agreement to have the cards authenticated by an impartial party and to be bound by such authentication.[35]

We interject to note that at this time—prior to *Gissel* in 1969—the applicable doctrine defined an employer's right of non-recognition as applicable only in case of a "good faith doubt as to the unions' majority status." Joy Silk Mills, Inc. v. NLRB, 87 U. S. App. D. C. 360, 185 F. 2d 732 (1950); Retail Clerks Union, Local No. 1179 v. NLRB, 376 F. 2d 186 (9th Cir. 1967). In *Gissel*, the Board announced "at oral argument that it had virtually abandoned the *Joy Silk* doctrine altogether."[36] The Court further stated the Board's position at that time (395 U. S. at 594):

> Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple "no comment" to the union. The Board pointed out, however, (1) that an employer could not refuse to bargain if he *knew*, through a personal poll for instance, that a majority of his employees supported the union, and (2) that an employer could not refuse recognition because of questions as to the appropriateness of the unit and then later claim, as an afterthought, that he doubted the union's strength.

35. Lesnick, *supra* note 31, at 852.

36. The "good faith" doubt test of *Joy Silk* had been widely criticized as plunging the Board and courts into a search for subjective intent. *See* Christensen & Christensen, Gissel Packing and "Good Faith Doubt": The Gestalt of Required Recognition of Unions Under the NLRA, 37 U. Chi. L. Rev. 411 (1970). It is one thing to abandon a subjective standard used to determine when employers are required to recognize on the basis of cards and replace it by the alternative, and arguably more objective, standard of "independent knowledge". That was the Supreme Court's understanding in *Gessel*. It is another thing to abandon any standard.

Subsequent to *Gissel*, two Board decisions expanded on the *Snow* rationale. In *Pacific Abrasive*,[37] presentation of the card majority was accompanied by the employer's verification of the signature on the cards, an acknowledgement of authenticity, conversations with employees who indicated union support, and a strike in support of recognition by a majority of the unit. The Board was thus relying on conduct of the employer or employees, in drawing the inference that the employer must have known that the union had a majority.[38] *Pacific Abrasive* was followed by the second decision in the instant case, *Wilder*, where the Board established "independent knowledge" on the basis of evidence in addition to mere cards, sufficient to communicate to the employer "convincing" knowledge of majority status.[39] In the Board opinions now before us for review, the Board has retreated to the facts of *Snow & Sons*, the fact of an agreement to be bound by an independent authentication, as offering the only valid basis for an employer duty to bargain on the basis of "independent knowledge." Thus, "[u]nless, as in *Snow & Sons*, the employer has agreed to let its 'knowledge' of majority status be established through a means other than a Board elec-

37. 182 NLRB 329, 74 LRRM 113 (1970).

38. Comment, *supra*, note 28, at 321.

39. The Board relied on the following facts in finding "independent knowledge":

> In the instant case, the record demonstrates not only that 11 out of 18 production and maintenance employees had signed authorization cards, but also that all of the card signers dramatically evidenced their support for the Union by actively participating in a picket line and in a strike, and furthermore, that an officer of the Respondent conceded in his testimony that he told his fellow officers that the Union "had 10 or 11" of his employees.

tion" (JA at 53-54) the facts will not justify an 8(a)(5) bargaining order.

It is important to understand, however, that it was represented to the Supreme Court in *Gissel* that the facts of *Snow & Son* laid the predicate for a finding of independent knowledge, not that a finding of "independent knowledge" was restricted to such facts.[40] The Board in its decision questions whether the Supreme Court accurately summarized its position.[41] This is not just a matter of historical detail; inherent in the two positions is a difference which goes to the heart of the Congressional policy established by the statute.

The abandonment of *Wilder II* means that even if an employer acts in total disregard of "convincing evidence of majority status," he has no duty to recognize a union. That duty can only be triggered by his own permission, in allowing an impartial party to assess union strength.

There were a number of indices in both *Wilder* and *Linden Lumber*, which could have laid the predicate for "convincing evidence of majority status"; in *Wilder*, there was a strike in support of the cards, and an admission of Respondent that the Union had "10 or 11" of his employees; in *Linden Lumber*, there was a recognitional strike, and a renege on the employer's agreement to abide by an election outcome after a "fresh" showing of a thirty percent support. The Union argues that these facts necessarily lay the foundation for a bargaining order.

Recognitional Strikes Not Necessarily Predicate for 8(a)(5) Bargaining Order

As to recognitional strikes in support of a card majority, we do not think prior cases establish this a conclusive showing of "convincing evidence." Petitioners place primary reliance on United Mine Workers v. Arkansas Oak Flooring Co., 351 U. S. 62 (1956), but that case merely established that a state court

40. *See* 395 U. S. at 594, quoted above.

41. JA at 53.

could not enjoin a recognitional strike where there was a card majority, solely because the union had failed to take necessary steps toward securing a Board election. The issue as to whether a recognitional strike laid the foundation for an 8(a)(5) charge was not before the court.[42] While there are circuit court decisions indicating that a strike supported by a unit majority undermines a good faith claim of doubt as to majority status, these cases are distinguishable.[43] There is no case holding that the statute requires the Board to use recognitional strikes as conclusive evidence, and it is that position for which the union contends.

42. Petitioners point to the following passage in *Gissel*, 395 U. S. at 596-97, as establishing the Court's acceptance of recognitional strikes as necessarily showing convincing support:

> Almost from the inception of the Act, then, it was recognized that a union did not have to be certified as a winner of a Board election to invoke a bargaining obligations: it could establish majority status by other means under the unfair labor practice provision of § 8(a)(5)—by showing convincing support, for instance, by a union called strike or strike vote, or as here, by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes.[11] [Footnote omitted.]

However, this passage merely begs the question here at issue, since the Court was simply using strike votes and cards as alternatives. Not even the union contends here, nor has it ever been Board practice, that a card majority *per se* invokes a duty to bargain. This is given added emphasis by footnote 11 of the above cited passage from *Gissel* which reads:

> The right of an employer lawfully to refuse to bargain if he had a good faith doubt as to the Union's majority status, even if in fact the Union did represent a majority, was recognized early in the Administration of the Act, see NLRB v. Remington Rand, Inc., 94 F. 2d 862, 868 (C. A. 2d Cir.), cert. denied, 304 U. S. 576 (1938).

43. *See, e.g.*, NLRB v. Harris-Woodson Co., 179 F. 2d 720 (4th Cir. 1950) (recognitional strike, in context of refusal to negotiate with an already certified unit); NLRB v. National Seal Corp., 127 F. 2d 776 (2d Cir. 1942) (recognitional strike accompanied by independent unfair labor practices, and anti-union animus of predecessor corporation).

Even assuming some test such as "independent knowledge" is required by the statute, that does not mean the Board must attach conclusive weight to recognitional strikes. As the Court described the role of the Labor Board in Republic Aviation Corp. v. NLRB, 324 U. S. 793, 800 (1945), "One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." It is certainly permissible for the Board to avoid encouraging recognitional striking and picketing by refusing to regard them as an independent and conclusive method of demonstrating a majority, particularly since workers might well honor a picket line without necessarily supporting the union.[44]

Other Evidence of Majority Support

Aside from the fact that in *Linden Lumber* the employer refused to acknowledge the "fresh" showing of majority support —which we deal with below in a different context—the only other indication of majority support was the admission of the employer in *Wilder* to other officers of the Company, that the Union "had 10 or 11 of his employees." While the Second Supplemental Decision of the Board did not comment directly on this evidentiary point, relied upon in its First Supplemental Decision, disregard of this evidence was apparently related to the Board's rejection of "the wisdom of attempting to divine, in retrospect the state of employer (a) knowledge, depicting this as re-entry into the "good faith thicket." We assume the "10 or 11" statement was made by the employer, for the Board seemingly does not contest this prior Board finding. While it

44. Refusal to cross a picket line may reflect mere fear, *see* NLRB v. Union Carbide Corp., 440 F. 2d 54, 56 (4th Cir. 1971), *cert. denied*, 404 U. S. 826 (1971). Or it may reflect a respect for what the individual supposes is the will of the majority even though he (and in fact a majority) does not wish the union to act as a bargaining representative.

may be that there would be difficulties in determining the state of past employer knowledge, in this case and in others, we cannot accept the view that this requires a union petition for an election as the only means for obtaining recognition. We turn, at this juncture, to another predicate for issuing a bargaining order, related to "independent knowledge" and its "good faith" predecessor: the failure of the company to evidence its own "good faith doubt" by itself petitioning for an election.

B. *Failure of Employer to Petition for Election as Pertinent to "Good Faith"*

In *Gissel*, the Court reviewed the legislative history of § 9(c)(B) of the 1947 Taft-Hartley Amendments. The Supreme Court stated, 395 U. S. at 599:

> That provision was not added, as the employers assert to give them an absolute right to an election at any time; rather, it was intended, as the legislative history indicates, to allow them, after being asked to bargain, to test out their doubts as to a union's majority in a secret election which they would then presumably not cause to be set aside by illegal antiunion activity [footnote 16 omitted].

In footnote 16, the Supreme Court noted that the Senate Report clearly indicates that the right to petition for an election was a way in which the employer could remove his doubt.[45] Neither Wilder nor Linden indicated that it wishes to have a doubt resolved by petitioning for an election. In the First Supplemental Decision in *Wilder*, two reasons were given for

45. As the Supreme Court noted, Senator Taft stated during the debates:

> Today an employer is faced with this situation. A man comes into his office and says "I represent your employees. Sign this agreement, or we strike tomorrow". . . . The employer has no way in which to determine whether this man really does represent his employees or does not. The bill gives him the right to go to the Board . . . and say "I want an election. I want to know who is the bargaining agent for my employees."

finding a violation of the duty to bargain. Besides holding that the employer had "independent knowledge" of the union's majority statute, the Board found that there was "insufficient evidence that the employer's refusal to grant recognition was based upon genuine willingness to resolve any doubts concerning majority status through the Board's election process," noting that "the Employer did not itself file an election petition or urge or even suggest to the employees or the Union the use of such procedures."

In *Linden*, of course the union did file a petition for an election simultaneous with its demand for recognition. The employer, however, after refusing to recognize on the basis of cards, indicated that he would not recognize the union even if it were victorious in an election. This led the Union to withdraw their petition and go straight to the 8(a)(5) proceeding, which was inevitable, in any event, at the end of the election process.

Of course, in *Linden*, the Board indicated that this fact would play no part in its decision since it was reassuring "the wisdom of attempting to divine, in retrospect, the state of employer (a) knowledge" and "(b) intent at the time he refuses to accede to a union demand for recognition." The Board went on to state " . . . if we are to let our decisions turn on an employer's 'willingness' to have majority status determined by an election, how are we to judge 'willingness' if the record is silent, as in *Wilder*, or doubtful, as here, as to just how 'willing' the Respondent is, in fact."

Whatever the merit of abandoning the "independent knowledge" doctrine because of the difficulty of reaching judgments required as to state of mind, the same cannot be said as to "willingness to have majority status determined by an election." One simple act, a petition by the employer for an election,[46] could evidence such "willingness." Indeed it was the premise

46. Or an employer's voicing of a consent to abide by an election ordered on union petition.

of the Taft-Hartley Amendment to § 9(c)(B) that employers could "test out their doubts as to a union's majority status" by petitioning for an election. In ignoring that opportunity, the Board ignores the very intent behind the statutory provision.

It is our view that the Board order cannot be enforced where both tests have been abandoned. It is conceivable that a restriction of "independent knowledge" to an agreement to abide by an authentication would be acceptable, if the employer was required to evidence his good faith doubt as to majority status, by petitioning for an election. The Board, on the other hand, is willing to resolve every assertion of doubt in the employer's favor, without permitting any "test" of those doubts. The union, of course, argues that an employer would violate § 8(a)(5) by petitioning for an election without entertaining actual doubt. This is, however, an issue we need not reach.

While we have indicated that cards alone, or recognitional strikes and ambiguous utterances of the employer, do not necessarily provide such "convincing evidence of majority support" so as to require a bargaining order, they certainly create a sufficient probability of majority support as to require an employer asserting a doubt of majority status to resolve the possibility through a petition for an election, if he is to avoid both any duty to bargain and any inquiry into the actuality of his doubt.[47]

47. The Board might, in order to reduce litigation and delay in these matters, adopt the rule that an employer must, when presented with an authorization card majority, either recognize the union or, within a reasonable time, petition for a certification election. Comment, *supra* 28, at 325. Without such a *per se* rule, of course, the Board would have to use some version of the "independent knowledge" test it considers workable, in order to define those conditions where a failure of an employer to petition for an election would be a predicate for an 8(a)(5) bargaining order.

When an employer petitions for or consents to election, the election process is expedited.[48] If he declines to exercise this option, he must take the risk that his conduct as a whole, in the context of "convincing evidence of majority support," may be taken as a refusal to bargain.

As is only too often the case in litigation trenching on deep feelings, each of the parties focused on its extreme position—the unions, on their claim to an 8(a)(5) order based on an "independent knowledge" test retained in full flower; the Board and the companies, on their claim that an 8(a)(5) obligation can flower only in case of employer consent to authentication. And so the position set forth in this opinion was not advanced by the parties. It was presented by the court during the course

48. Board member Fanning, dissenting in the Second Supplemental Decision in *Wilder*, observed that:

> [O]ur experience in conducting elections demonstrates that where employers are willing to go to an election, the election is held more expeditiously and with far less likelihood of interference in the conduct of the election than is the case where either party has to be forced to an election.

One commentator, on the basis of an interview with Martin Schneid, Assistant to the Regional Director, NLRB, has concluded that "an election contested through submission of objections at a pre-election hearing is likely to take sixty to sixty-three days between petition and balloting, while a consent election, in which the hearing is waived, is likely to take only twenty to twenty-three days. Comment, *supra* note 28, at 325 n. 48.

The additional speed is obtained by the ability to dispense with objections at a prehearing conference. If an employer files a petition for an election, he would be required to define the appropriate unit and therefore would not be entitled, as an objecting party, to request a hearing. Nor could the employer object to a sufficient (30%) showing of majority support.

The direct consequences of such a rule are immediately apparent in the context of *Wilder* where the employer challenged the appropriateness of the unit—this was, in fact, an asserted reason for not recognizing the union on the basis of cards—and in *Linden Lumber* where the employer raised his possible § 8(a)(2) liability for recognizing a union dominated by supervisors, as well as connected unit problems. Yet the trial examiners in both cases found there was no basis for such concerns, thus indicating how such issues may be used to delay elections.

of argument, and counsel had an opportunity to develop whatever objections were seen. If objections had subsequently been visualized, leave to file a post-argument memorandum could have been sought, and properly so. Hearing no such objection, and seeing none ourselves on further reflection[49], we conclude the principle herein set forth is sound.

49. We take note of the possibility that an employer may contend that he does not want to petition for an election because he fears that an agreement with the certified union may be challenged as a "sweetheart" deal prohibited by § 8(a)(2). Such a contention is more likely to reflect a tactic than a genuine problem. This seems to have been the case in *Linden*, where the employer first objected to the Union petition for election on the ground of inclusion of supervisors in the unit, then promised to proceed with a consent election if the Union made a fresh start, yet later objected to a new Union showing of interest on a petition for election established without cards from the challenged persons, on the ground that the problem was not remediable.

In any event, to the extent that an employer's petition for election may be followed by an issue under § 8(a)(2), on a "sweetheart" objection, this is a modest and limited difficulty which was accepted by Congress as an objection lacking sufficient significance to override the value of employer petitions in arrivng at labor peace and resolution of problems.

Of course, the possibility exists—indeed it was raised in *Linden Lumber*—that the employer would be subject to an 8(a)(5) violation if he did not recognize a union, but subject to an 8(a)(2) charge if he did, and it was later found that the Union was employer-dominated. This possibility is significantly increased, it could be argued, by taking away the possibility of raising the 8(a)(2) defense to a union election petition, as a self-protection measure of the employer. *See* International Ladies' Garment Workers Union v. NLRB, 366 U. S. 731 (1961). One possible reply to this dilemma is that it is less of a problem following an election, as compared to the situation which would exist if the only option was card recognition. *See id.* at 739; *Compare* Shea Chemical Corp., 121 NLRB 1027 (1958).

IV. CONCLUSION

We hold that if "independent knowledge" is to be restricted, some alternative must be put in its place to prevent an employer's deliberate flouting and disregard of union cards without rhyme or reason. The complete lack of such an alternative would not be consistent with the Act. If no "independent knowledge" or "good faith" test is to be used by the Board, the employer must be put to some other kind of test to evidence good faith. *Compare* Food Store Employees Union v. NLRB, 476 F. 2d 546, 554 (D. C. Cir. 1973). The alternative such as employer petition for election retains primary emphasis on the election process, and its preferred status. The position adopted by the Board is inconsistent with the Act and its orders must be reversed. We remand to the Board to reconsider what option, consistent with the statute, it wishes to follow.

Reversed and remanded.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

September Term, 1972

No. 71-1529

TRUCK DRIVERS UNION LOCAL NO. 413, ETC., ET AL.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

No. 72-1794

TEXTILE WORKERS UNION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petitions for Review of Orders of the National Labor Relations Board

Before: LEVENTHAL and ROBB, *Circuit Judges* and JAMESON,* *Senior United States District Judge* for the District of Montana

* Sitting by designation pursuant to 28 U. S. C. § 294(d).

JUDGMENT

The causes came on to be heard on petitions for review of orders of the National Labor Relations Board and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the orders of the National Labor Relations Board appealed from in these causes are hereby reversed and these cases are hereby remanded to the National Labor Relations Board in accordance with the opinion of this Court filed herein this date.

Per Curiam for the Court

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

Date: September 13, 1973

Opinion for the Court filed by Circuit Judge Leventhal

APPENDIX C

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

September Term, 1973

No. 71-1529

TRUCK DRIVERS UNION LOCAL NO. 413, ETC., ET AL.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 72-1794

TEXTILE WORKERS UNION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Before: LEVENTHAL and ROBB, *Circuit Judges;* and JAMESON,* *United States Senior District Judge* for the District of Montana

* Sitting by designation pursuant to Title 28, U. S. C. § 294(d).

ORDER

The Clerk is directed to file the lodged motions of Linden Lumber Division, Summer & Co.:

(1) to intervene;

(2) for enlargement of time to file petition for rehearing.

On consideration thereof and of petitioner's opposition to motion to intervene, it is

ORDERED by the Court that each of the aforesaid motions is granted and the Clerk is directed to file the lodged petition of Linden Lumber Division, Summer & Co., for rehearing and suggestion for rehearing *en banc*.

The Court is granting Linden leave to intervene, in order that it may have standing to seek rehearing and possibly certiorari, but taking into account Linden's late intervention as a party, and the content of its petition for rehearing filed October 12, 1973 the Court's order hereby provides that this intervention shall not stay issuance of the mandate, and that the mandate will issue five days after the entry of this order. This will serve to permit NLRB's further consideration of this already elongated proceeding without being compelled to await the disposition of such further pleadings as Linden may file.

Per Curiam

APPENDIX D

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

September Term, 1973

No. 71-1529

TRUCK DRIVERS UNION LOCAL NO. 413, ETC., ET AL.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

No. 72-1794

TEXTILE WORKERS UNION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Before: LEVENTHAL and ROBB, *Circuit Judges;* and JAMESON,* *United States Senior District Judge* for the District of Montana

ORDER

On consideration of the petition of Intervenor, Linden Lumber Division, Summer & Co., for rehearing, it is

ORDERED by the Court that the aforesaid petition for rehearing is denied.

Per Curiam

* Sitting by designation pursuant to Title 28, U. S. C. § 294(d).

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-617

LINDEN LUMBER DIVISION, SUMMER & CO.,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 10, 1974.

/s/ W. E. B.
Chief Justice of the United States.

Dated this 20th day of December, 1973.

APPENDIX F

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LINDEN LUMBER DIVISION, SUMMER & CO. [Columbus, Ohio]	[190 NLRB No. 116]
and	
TRUCK DRIVERS UNION Local No. 413, affiliated with International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America	Cases 9-CA-4197 9-CA-4283 9-CA-4309

DECISION AND ORDER

On January 26, 1968, Trial Examiner Ivar H. Peterson issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a brief in support thereof. The Charging Party filed an answering brief.

Thereafter, by Order of April 15, 1968, the National Labor Relations Board remanded the proceeding to Trial Examiner Peterson to consider further Respondent's defense to the 8(a)(5) allegation, by making findings of fact concerning (1) the supervisory status of Shafer and (2) if a supervisor, the impact of Shafer's conduct on the validity of the Union's card majority, and for making any other or additional findings based on the record as supplemented, if necessary, by evidence received at a reopened hearing.

On April 26, 1968 the Trial Examiner issued his Supplemental Decision, also attached hereto, making findings in accord with the remand. He concluded that it was unnecessary to take additional evidence because the existing record established that Shafer was a supervisor and that Shafer did not taint the Union's majority by either signing a card or any other conduct. The Trial Examiner also indicated that he would adhere to the findings, conclusions, and recommendations contained in his original Decision of January 26, 1968. Thereafter, Respondent filed exceptions to the Supplemental Decision and a brief in support thereof.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions thereto, the brief and answering brief, the Supplemental Decision, the exceptions thereto and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith:

The facts are fully set forth in the Trial Examiner's Decisions. On December 28, 1966, employee Martin contacted Union Representative Norman about organizing Respondent's employees. The next day Norman held a meeting during which 12 employees, including 2 alleged supervisors, Shafer and Marsh, signed authorization cards. (The parties stipulated that the unit consisted of 12 employees, excluding 3 whose eligibility was disputed.) On January 3, 1967, the Union sent a letter to the Respondent requesting recognition and on January 5 filed a representation petition (Case 9-RC-7096). On January 6, the Respondent replied that it did not believe the Union represented a majority and suggested that the Union petition the Board for an election. On January 9, pursuant to the RC petition, the Respondent submitted a list of employees which included Shafer and Marsh as well as one other employee stipu-

lated by all parties at the hearing to be a supervisor, and a dispatcher on whose status all parties reserved.

On February 3, at a prehearing conference on the Union's petition attended by the parties, Marsh and Shafer were present as employee representatives of the Union. During that conference, Union Attorney Smedstad asked Company Consultant Rector if the Respondent would enter into a consent election agreement. Rector replied that since the Union had been organized by supervisors (Marsh and Shafer) it would be unlawful for the Company to recognize it according to cases in the Sixth Circuit. At that point the Hearing Officer stated that evidence of organization by supervisors did not warrant a hearing since the Union's showing of interest could not be litigated in a representation proceeding. Rector then said, "Well, if you are going to deny me the right of a record on this, then the Board can do what it wants to. If it holds an election, the Company will not bargain with the Union." (At that time the issues going to the validity of an election were limited to the validity of the Union's showing, there being no dispute on jurisdiction, labor organization, or the appropriate unit.)

Immediately after Rector's statement, the union representatives withdrew the representation petition. After the withdrawal was approved Rector told Smedstad that if the Union submitted a new petition supported by a "fresh" 30-percent showing of interest, the Company would go to a consent election. When Smedstad replied that the Union had "all the people lined up," Rector retorted that, since supervisors had solicited these people, there was no fresh showing. Moreover, the Respondent would not bargain with the Union and there was no chance for a consent election at this point.

Subsequently, at a meeting on February 4, nine employees signed a statement that they voluntarily desired union representation and believed the Company would not want them to join the Union. While Shafer and Marsh attended the meeting, they

did not sign the statement. Shafer resigned from Respondent's employ on February 6.

On February 6, Norman presented the statement to the plant manager who said that he would refer the matter to Rector. On February 8, Rector wrote Norman that the Respondent refused to recognize the Union because its membership included supervisors who influenced employees, therefore, Respondent's recognition would violate Section 8(a)(2). The letter also stated that the Union had the opportunity to prove its claim before the National Labor Relations Board, but withdrew its petition. The letter concluded that although the Board should decide this matter, it is "powerless" to do so because of the withdrawal of the RC petition.

On February 15, the employees went out on strike in support of the Union's demand for recognition. Initially, Marsh did not join the strike on union instructions not to do so because his status as a supervisor was in question. On February 27, Marsh ceased work, apparently joining the strikers. The Union filed its charge of refusal to bargain on February 23, and the strike ended on June 1.

At the end of the strike Respondent refused to reinstate Marsh and another striker, Alexander. Marsh was refused reinstatement on the ground that he had quit. Alexander was refused on the strength of Respondent's belief that he had provoked and participated in a violent incident related to the picketing at Respondent's plant.

On these facts, the Trial Examiner concluded that Respondent violated Section 8(a)(5) by refusing to recognize the Union, that the strike which occurred was an unfair labor practice strike, and that Marsh and Alexander were unlawfully denied reinstatement in violation of Section 8(a)(3). The Trial Examiner's recommended remedy included a direction to Respondent to recognize and bargain with the Union. We disagree with the Trial Examiner's conclusion that Respondent violated Section 8(a)(5), and we reject the conclusion that the strike was an unfair labor practice strike. We conclude nevertheless that Marsh and Alexander, as economic strikers, were wrongfully denied reinstatement in violation of Section 8(a)(3).

Our conclusion that Respondent violated Section 8(a)(3) requires, as a threshold matter, that we examine the nature of the violations and their probable impact on Respondent's employees in order to determine whether an order to bargain is an appropriate remedy for those violations under the standards of *N. L. R. B.* v. *Gissel Packing Co.*, 395 U. S. 575 (1969). *Gissel* establishes our discretion to impose a remedial order to bargain in any case where we find that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order. . . . *"Id.*, 614-615. We conclude that Respondent's violations here did not have such an impact on the employees that a fair and truly representative election could not have been conducted. We reach this conclusion upon assessment of the extensiveness of the practices, their effect on election conditions (although the Union withdrew its petition and no election was conducted) and the likelihood of their recurrence. We rely on the facts, among others, that the violations were quite distant in time from the start of the union organizing campaign and occurred under circumstances which could not readily be regarded by other employees as retribution for any organizing activity. Nor are we persuaded that there is substantial likelihood that such practices will recur. The Respondent here declined to reinstate the two employees for reasons which do not suggest far-reaching antiunion animus: Marsh was thought by Respondent, albeit mistakenly, to be a supervisor; Alexander was thought to have engaged in picket line misconduct. Although we now conclude that Respondent's

defense as to each is insufficient, and that each violation occurred, we cannot assume, on these facts, that Respondent was motivated, in either case, by other than a good-faith belief in the propriety of its actions. Such impact as there may have been will, in any event, be substantially erased by our traditional remedy of reinstatement, backpay, and posting of notices.

We next consider whether, aside from the rationale of *Gissel*, an order to bargain may be imposed on the ground that Respondent violated Section 8(a)(5) by refusing to recognize and bargain with the Union following the Union's proffer of authorization cards from a majority of Respondent's employees.

We recently held in *Derse, Arthur F., Sr., President, and Wilder Mfg. Co., Inc.*,[1] that mere refusal to recognize on the strength of a card showing was not enough to support a finding of an 8(a)(5) violation. We did, however, find a violation under the facts of that case where the employer had independent knowledge of the union's majority status and where no effort was made to resolve any possible majority status issue through resort to Board election procedures.

In the instant case we must evaluate a refusal to recognize the Union on the strength solely of its authorization cards, an abortive Board election proceeding, and then a strike. The election proceeding was terminated by action of the Union in withdrawing its petition although that withdrawal appears to have been motivated by the precipitate declaration of Respondent's representative that "if [the Board's] holds an election, the Company will not bargain with the Union." This statement in turn was motivated by the Hearing Officer's ruling that evidence of possible supervisory taint of the showing of interest would not be received at the hearing, since the investigation of showing of interest is an administrative matter which cannot be litigated in the course of a representation proceeding. Subsequently, the Employer's representative offered to consent

1. 185 NLRB No. 76.

to an election if the Union submitted a new petition supported by a "fresh" 30-percent showing of interest.

The facts of this case demonstrates the difficulties of attempting to interpret and apply Section 8(a)(5) of the Act to situations in which the Union's majority status has not been established through our election processes, and where the record does not contain evidence of independent unfair labor practices which would justify a bargaining order under *Gissel*.

At the outset, we note that in *Gissel* the Supreme Court did not face this issue and explicitly refrained from providing any guidance in this area. Rather, after setting forth its understanding of the positions of the parties as to a proper interpretation of the law applicable to the cases then at bar, the Court declared that it "need not decide whether a bargaining order is ever appropriate in cases where there is no interference with the election processes." *Id.*, 595. Later in its opinion the Court reiterated and elaborated upon this point:

> In dealing with the reliability of cards, we should reemphasize what issues we are not confronting. As pointed out above, we are not here faced with a situation where an employer, with "good" or "bad" subjective motivation, has rejected a card-based bargaining request without good reason and has insisted that the Union go to an election while at the same time refraining from committing unfair labor practices that would tend to disturb the "laboratory conditions" of that election. We thus need not decide whether, absent election interference by an employer's unfair labor practices, he may obtain an election only if he petitions for one himself; whether, if he does not, he must bargain with a card majority if the Union chooses not to seek an election; and whether, in the latter situation, he is bound by the Board's ultimate determination of the card results regardless of his earlier good faith doubts, or whether he can still insist on a Union-sought election if he makes an affirmative showing of his positive reasons for believing there is a representation dispute. In short, a union' right to rely on cards as a freely interchangeable substitute for elections where there has been no election

> interference is not put in issue here; we need only decide whether the cards are reliable enough to support a bargaining order where a fair election probably could not have been held, or where an election that was held was in fact set aside [*Id.*, 601, fn. 18.]

The resolution of the instant proceeding now requires the Board to face and decide one of the difficult issues which the Supreme Court left open in *Gissel*: whether, absent election interference, an employer who insists on an election must initiate the election by his own petition. Board precedent on the issue is something less than a model of clarity. The "current practice" of the Board was summarized in *Gissel* as follows:

> Under the Board's current practice, an employer's good faith doubt is largely irrelevant, and the key to the issuance or a bargaining order is the commission of serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election.
>
> Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple "no comment" to the union. The Board pointed out, however, (1) that an employer could not refuse to bargain if he *knew*, through a personal poll for instance, that a majority of his employees supported the union, and (2) that an employer could not refuse recognition initially because of questions as to the appropriateness of the and then later claim, as an afterthought, that he doubted the union's strength. [Id., 594.]

There is some question as to whether the summary is entirely accurate. The statement that an employer could not refuse to bargain "if he *knew*, through a personal poll for instance, that a majority of his employees supported the union," may well have referred to *Snow, Fred, Harold Snow and Tom Snow, d/b/a Snow & Sons*, 134 NLRB 709, enfd. 308 F. 2d 687

(C. A. 9). But the decision in that case rested not only on the fact of employer *knowledge*, but also upon the fact that the employer breached his agreement to permit majority status to be determined by means other than a Board election. That case must be distinguished from our recent decision in *Wilder, supra*. There we found an 8(a)(5) violation not only because of admitted employer knowledge of majority status, but also because of the absence of any evidence that the employer was willing to resolve any lingering doubts of majority status through our election procedures.

The facts of the present case have caused us to reassess the wisdom of attempting to divine, in retrospect, the state of employer (a) knowledge and (b) intent at the time he refuses to accede to a union demand for recognition. Unless, as in *Snow & Sons*, the employer has agreed to let its "knowledge" of majority status be established through a means other than a Board election, how are we to evaluate whether it "knows" or whether it "doubts" majority status? And if we are to let our decisions turn on an employer's "willingness" to have majority status determined by an election, how are we to judge "willingness" if the record is silent, as in *Wilder*, or doubtful, as here, as to just how "willing" the Respondent is in fact? We decline, in summary, to reenter the "good-faith" thicket of *Joy Silk*,[2] which we announced to the Supreme Court in *Gissel* we had "virtually abandoned . . . altogether," *id.*, 594.

These considerations lead us to the conclusion that Respondent should not be found guilty of a violation of Section 8(a)(5) solely upon the basis of its refusal to accept evidence of majority status other than the results of a Board election. We repeat for emphasis our reliance here upon the additional fact that the Respondent and the Union never voluntarily agreed upon any mutually acceptable and legally permissible means, other than a Board-conducted election, for resolving the issue of union

2. *Joy Silk Mills, Inc.*, 85 NLRB 1263, enfd. as modified 185 F. 2d 732.

majority status. By such reliance we recognize and encourage the principle of voluntarism but at the same time insure that when voluntarism fails the "preferred route" of secret ballot elections is available to those who do not find any alternative route acceptable.

We shall, therefore, dismiss the 8(a)(5) allegations of the instant complaint.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Linden Lumber Division, Summer & Co., Columbus, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Truck Drivers Union Local No. 413, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or in any other labor organization, by discriminatorily failing or refusing upon their unconditional request to reinstate any of its employees who have engaged in a strike and are lawfully entitled to reinstatement, or by discriminating against its employees in any other manner in regard to hire or tenure of employment or any term or condition of employment.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to Richard E. Marsh and Richard L. Alexander immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

(b) Notify the said employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due and to analyze reinstatement rights under the terms of this Order.

(d) Post at its premises in Columbus, Ohio, copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

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3. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS HEREBY FURTHER ORDERED that the complaint herein be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein.

Dated, Washington, D. C.

EDWARD B. MILLER,
Chairman
HOWARD JENKINS, JR.,
Member
RALPH E. KENNEDY,
Member
NATIONAL LABOR RELATIONS BOARD

MEMBERS FANNING and BROWN, dissenting:

For the reasons explained below, we would affirm the Trial Examiner's finding that the Respondent's refusal to recognize and bargain with the Union violated Section 8(a)(5) of the Act and that, in the circumstances presented, a bargaining order is clearly warranted.

Under settled Board and court policy, an employer, when confronted by a recognition demand based on authorization cards allegedly signed by a majority of his employees, does not automatically violate Section 8(a)(5) of the Act if he declines such demand and insists, instead, upon an election requesting the union to file a representation petition or filing it himself under Section 9(c)(1)(B) of the Act.[4] Such violations are most frequently found where the employer's denial of recognition is accompanied by independent unfair labor practices impeding the Board's election processes. This is not to say, however, that such unlawful conduct is an indispensable prerequisite to an 8(a)(5) finding, or that, absent such independent unfair labor practices, employers are necessarily free to decline recognition until the Union shall have been certified. Thus, an employer may not avoid or delay his statutory obligation to bargain where there

4. See discussion of *N. L. R. B.* v. *Gissel Packing Company, Inc.*, 395 U. S. 575, *infra*.

is no real dispute that a union represents a majority of his employees and the refusal to bargain is founded upon considerations extraneous to the union's majority status.[5] In the absence of such a dispute, an employer violates Section 8(a)(5) of the Act if his refusal to bargain is based, for example, on an erroneous view of the law,[6] or an erroneous belief that the unit requested by the union is inappropriate,[7] or that the union representatives were under a legal disability which prevented them from binding the union,[8] or that his employees were independent contractors.[9]

Similarly, an employer, having satisfied himself (by card check, independent poll of the employees, or by other means) that a union enjoys the support of a majority of his employees, may not thereafter assert a doubt of the union's majority as grounds for refusing to bargain and insisting on an election.[10] In *Snow & Sons, supra*, for example, we held, with court approval, that the employer violated Section 8(a)(5) where, having agreed to be bound by an independent check of a union's authorization cards to resolve his doubt as to the union's majority status—which check substantiated the union's claim of majority—the employer reneged on his agreement by continuing to refuse to bargain and insisting upon an election.

Briefly, the facts in this case show that, in response to the Union's initial recognition demand, the Respondent, on January

5. *H & W Construction Company, Inc.*, 161 NLRB 852, 854-855, and cases cited therein.

6. *Old King Cole, Inc.* v. *N. L. R. B.*, 260 F. 2d 530, 532 (C. A. 6).

7. *United Aircraft Corporation* v. *N. L. R. B.*, 333 F. 2d 819, 833 (C. A. 2), cert. denied 380 U. S. 910; *Florence Printing Co.* v. *N. L. R. B.*, 333 F. 2d 289 (C. A. 4).

8. *N. L. R. B.* v. *Burnett Construction Co.*, 350 F. 2d 57 (C. A. 10).

9. *N. L. R. B.* v. *Keystone Floors, Inc., d/b/a Keystone Universal Carpet Co.*, 306 F. 2d 560, 564 (C. A. 3).

10. *Snow & Sons*, 134 NLRB 709, enfd. 308 F. 2d 687 (C. A. 9), cited with approval in *Gissel Packing Co., Inc.*, 395 U. S. 575; *Wilder Mfg. Co.*, 185 NLRB No. 76.

6, 1967, replied that it did not believe that the Union represented a majority and suggested that the Union petition the Board for an election. The Union had already filed such a petition on January 5. On February 3, when the parties met for a prehearing conference pursuant to the Union's petition, the Respondent announced that it would not bargain with the Union in any event—even if it were certified by the Board after winning an election—because it contended that the Union represented supervisors (Marsh and Shafer) who influenced the employees in signing authorization cards.[11] The Union thereupon withdrew its petition and, after withdrawal was approved, the Respondent's representative, Rector, told the Union's attorney, Smedstad, that if the Union submitted a "fresh" 30-percent showing of interest the Company would agree to a consent election.

At a meeting with the Union on the following day, February 4, nine employees signed a statement that they voluntarily desired to be represented by the Union and that they believed the Company would not want them to join the Union. Although alleged supervisors Marsh and Shafer attended that meeting, they did not sign the statement. Shafer resigned from Respondent's employ on February 6. On that day the Union's representative presented the employees' statement of reaffirmation to the Company and, on February 8, Rector wrote to the Union that the Respondent refused to recognize the Union because its membership included supervisors who influenced employees and that, therefore, recognition would violate Section 8(a)(2) of the Act. On February 15, a majority of the employees in the unit went out on strike in support of the Union's recognition demand. On advice of the Union, alleged supervisor Marsh did not participate in the strike, as his status was in dispute.

11. Alleged supervisors Marsh and Shafer attended this conference as employee representatives of the Union. Their status is discussed, *infra*.

Based on the foregoing facts, which our colleagues do not dispute, it is clear that, at the time of the Respondent's refusal to bargain on February 8, there was no question and the Respondent had no doubt that a majority of its employees supported the Union and wanted the Union to represent them for purposes of collective bargaining, and that its refusal was grounded solely upon an erroneous belief that supervisors had influenced the unit employees and that, therefore, the Union's majority was tainted. In these circumstances, we would find, for the reasons substantially as stated in *H & W Construction Company, Inc.*,[12] that the contentions asserted by the Respondent for refusing to bargain, being unrelated to the Union's majority status, did not constitute an adequate defense to the refusal-to-bargain complaint and that the refusal to bargain, therefore, violated Section 8(a)(5) of the Act. For, neither the statement signed by the nine employees nor the strike in which a majority of the employees openly reaffirmed their support of the Union indicated any participation or influence by alleged supervisors. Furthermore, the record establishes, and the Trial Examiner found, that Marsh was not a supervisor and, in light of the facts, the Respondent's contention to the contrary borders on frivolity. As to Shafer, whom the Trial Examiner found to be a supervisor, there is no evidence that he influenced the employees to support the Union. In fact, and because their status was in issue, neither Marsh nor Shafer signed the statement in which a majority of the employees reiterated their voluntary allegiance to the Union. In addition, Shafer resigned from the Respondent's employ on February 6, 2 days before the Respondent refused to bargain with the Union on grounds of alleged supervisory influence. Therefore, even assuming, *arguendo*, that Shafer's presence at the February 4 union meeting may have indirectly influenced employees (a finding which we do not make) such influence would have been completely dissipated and neutralized by his resignation, and therefore, he

12. 161 NLRB 852, 854-855.

could certainly not have improperly influenced the employees in their concerted decision to go out on strike on February 15.

Our colleagues, on the other hand, find that a bargaining order is not warranted under the principle's enunciated in *Gissel*,[13] since the Respondent's unfair labor practices here were not such as would preclude the holding of a fair election, and that, therefore, this case raises the very issues which the Supreme Court expressly left unanswered in *Gissel*:[14]

Whether, absent election interference, an employer who insists upon an election must initiate the election by his own petition. We fail to perceive how the facts of this case put that question squarely in issue here. For, the record clearly establishes that the employer did not insist upon an election, or even want an election. Nor was the employer's refusal to bargain at any time based upon an asserted doubt of majority or any other issue resolvable through an election. To the contrary, the Respondent had knowledge, independently of the authorization cards, that a majority of its employees supported the Union and not only refused to bargain because of considerations extraneous to the Union's majority, but expressly and completely rejected the idea of going to an election by aggressively announcing that it would not bargain even if the Union were certified pursuant to a Board election. This assertion directly caused the Union to withdraw its petition as a wholly futile route for resolving any question of majority status and, in our view, tainted the possibility of holding a fair and meaningful election. As the operative facts herein are undisputed, the majority opinion raises and resolves issues not germane to this case.

13. *N. L. R. B.* v. *Gissel Packing Company, Inc.*, 395 U. S. 575.

14. Because the employer's refusal to bargain in *Gissel* was accompanied by independent unfair labor practices tending to preclude the holding of a fair election, the Supreme Court said: ". . . we need not decide whether a bargaining order is ever appropriate in cases where there is no interference with the election processes." *Supra*, 595; see also p. 601, fn. 18, set forth in text of majority opinion.

What disturbs us more, however, is that the majority's resolution of the foregoing issue ignores the guidelines provided in *Gissel, supra*, and overrules, without specifically so stating, our recent decision in *Wilder*[15] which followed those guidelines in resolving that same issue. To the extent relevant here, the Supreme Court's *Gissel* opinion, aside from its specific holdings, is noteworthy in that: (1) it expressly reaffirms the historical interpretation of the Act with respect to an employer's bargaining obligation under Section 8(a)(5) whenever the union presents "convincing evidence of majority support" and the propriety of establishing such obligation by means other than a Board-conducted election;[16] and (2) it rejects the contention

15. *Wilder Mfg. Co., Inc.*, 185 NLRB No. 76.

16. In discussing whether a union can establish a bargaining obligation by means other than a Board election, the Supreme Court said:

> A union is not limited to a Board election, however, for, in addition to § 9, the present Act provides in § 8(a)(5) . . . that "[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Since § 9(a) . . . refers to the representative as the one "designated or selected" by a majority of the employees without specifying precisely how that representative is to be chosen, *it was early recognized that an employer had a duty to bargain whenever the union representative presented "convincing evidence of majority support."* Almost from the inception of the Act, then, it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means under the unfair labor practice provision of § 8(a)(5)—by showing convincing support, for instance, by a union-called strike or strike vote, or, as here, by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes. [Footnotes omitted.] [Emphasis supplied].

We have consistently accepted this interpretation of the Wagner Act and the present Act, particularly as to the use of authorization cards. . . . Thus . . . we . . . pointed out in [*United Mine Workers* v. *Arkansas Flooring Co.*, 351 U. S. 62 (1956)], where the union had obtained signed authorization cards from a majority of the employees, that "[i]n the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the em-

that Section 9(c)(1)(B) of the Act gives employers an absolute right to an election at any time and finds, instead, that subparagraph (B) of Section 9(c)(1) was enacted to allow an employer, after being asked to bargain by a union claiming to represent a majority of his employees, to test out his doubts as to the union's majority.[17]

The Board adhered to these principles in *Wilder, supra.* Although the employer's refusal to bargain in that case was not accompanied by independent unfair labor practices, the Board nevertheless held that a bargaining order was appropriate, because the record contained substantial evidence, in addition to the signed authorization cards, to demonstrate the employer's knowledge of majority status, and no evidence demonstrating the employer's willingness or desire to resolve any doubts which it may have entertained through the election process.[18] That decision, in our opinion, is sound law and reflects long-established principles which the Supreme Court reaffirmed in *Gissel, supra.* The majority, on the other hand, would now

ployer's denial of recognition of the union would have violated § 8(a)(5) of the Act." 351 U. S., at 69. We see no reason to reject this approach to bargaining obligations now. . . . [*Gissel, supra,* 596-598.]

17. The Court, at page 600, expressly "agree[d] that the policies reflected in Section 9(c)(1)(B) fully support the Board's present administration of the Act (see *supra,* at 591-592)." This latter reference is to the Court's summation of the Board's current practice, to wit:

> When confronted by a recognition demand based on possession of cards allegedly signed by a majority of his employees, an employer need not grant recognition immediately, but may, *unless he has knowledge independently of the cards that the union has a majority,* decline the union's request and insist on an election, either by requesting the union to file an election petition or by filing such a petition himself under § 9(c)(1)(B). [Emphasis supplied.] *Gissel, supra,* 591.

18. The Board based its findings of employer knowledge upon the fact that all 11 of the 18 unit employees who had signed authorization cards "dramatically evidenced their support for the Union by actively participating in a picket line and a strike" and the employer's concession that it knew that 10 or 11 employees in the unit supported the union. *Wilder, supra.*

quietly overrule *Wilder* and find that, except for an election, a bargaining obligation under Section 8(a)(5) may be established only in situations such as prevailed in *Snow & Sons,*[19] where the employer having agreed to abide by the results of a private poll of his employees, subsequently reneged on that agreement when the poll confirmed the union's claim of majority.[20] We cannot accept this limited approach to determining an employer's bargaining obligation as we believe it is contrary to well-established law. It is significant that the Supreme Court, in *Gissel, supra,* expressly cited union-called strikes or strike votes as examples of "convincing evidence of majority support" upon which a union may rely to invoke a bargaining obligation under Section 8(a)(5).

In view of all the foregoing, we would find that the Respondent's refusal to bargain with the Union on and after February 8, 1967, violated Section 8(a)(5) of the Act and that, in all of the circumstances, a bargaining order is clearly warranted.

JOHN H. FANNING, *Member*
GERALD A. BROWN, *Member*
NATIONAL LABOR RELATIONS BOARD

19. *Snow & Sons,* 134 NLRB 709, enfd. 308 F. 2d 687 (C. A. 9).

20. Indeed, in our view, this case is not unlike *Snow & Sons, supra,* since the Respondent had agreed to go to a consent election if the Union submitted a "fresh" 30-per cent showing of interest, and thereafter reneged on its promise when the Union submitted such showing which indicated that a clear majority supported the Union.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT discourage membership in or activity on behalf of Truck Drivers Union Local No. 413, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization by discriminatorily failing or refusing to reinstate any of our employees or by discriminating in any other manner in regard to hire or tenure of employment or any term or condition of employment, except as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL offer Richard E. Marsh and Richard L. Alexander immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to seniority and other rights and privileges.

WE WILL make the said Marsh and Alexander whole for any loss of pay suffered as a result of refusing to reinstate them.

All our employees are free to become or remain, or refrain from becoming or remaining, members of the above-named Union or any other labor organization.

LINDEN LUMBER DIVISION, SUMMER & CO.
(Employer)

Dated ..... By .....
(Representative) (Title)

We will notify immediately the above-named individuals, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 2407, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513—684-3686.

APPENDIX G

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

IVAR H. PETERSON, Trial Examiner: Upon separate charges filed by Truck Drivers Union Local No. 413, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 9, issued complaints which on July 31, 1967[1] were consolidated for hearing, against Linden Lumber Division, Summer & Co., herein called the Respondent. Briefly stated, the complaints alleged that the Respondent had unlawfully refused to bargain with the Union, thereby causing an unfair labor practice strike, and that it had discriminatorily refused to reinstate two employees, all in violation of Section 8(a)(5), (3), and (1) of the Act. The Respondent answered, admitting certain allegations but denying the commission of any unfair labor practices; by way of affirmative defense, it alleged in substance that the Union was formed by supervisors of the Respondent and was not, therefore, entitled to recognition. As to the alleged discrimination against two employees, it averred that one, Richard Marsh, was a supervisor who "established and dominated" the Union and as to Richard L. Alexander, that he "participated in an act of violence against two customers of Respondent during the strike" and in consequence was not entitled to reinstatement.

Pursuant to notice, I heard the case in Columbus, Ohio, on October 3 and 4. All parties were represented and were afforded full opportunity to participate in the hearing. Briefs filed by each of the parties have been considered.

1. Unless otherwise indicated, all dates refer to the year 1967. The charges in Case 9-CA-4197 were filed February 23 and the complaint issued May 24; in Case 9-CA-4283 charges were filed on May 25 and the complaint issued on July 31; and in Case 9-CA-4309 the charges were filed on June 8 and the complaint issued on July 31.

Upon the entire record in the case, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is an Ohio corporation engaged in the manufacture of prefabricated homes and the sale of lumber products at its plant in Columbus, Ohio. It annually has a direct inflow of products valued in excess of $50,000 which it obtains from points outside the State of Ohio. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Truck Drivers Union Local No. 413, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

On December 28, 1966, William Martin, an employee of the Respondent, called Dow Norman, business agent and organizer of the Union, advising that the Respondent's employees desired to join the Union and have it act as their collective-bargaining representative. As a result of this call, 12 employees, including Marsh and Alexander, the alleged discriminatees, attended a meeting with Norman on December 29, 1966, at a restaurant in Columbus. All signed authorization cards on behalf of the Union.

On January 3, Mit Duncan, Secretary-Treasurer of the Union, wrote to the Respondent, attention William Riley, general manager, stating that the Union had been designated as the collective-bargaining representative by a majority of the Respondent's "truck drivers, warehousemen, production workers, maintenance men and yard men." He demanded that the Respondent recognize the Union as "the agent for collective bargaining for these employees." The Respondent replied on January 6, stating that it did not "believe that your Union does represent a majority," declining to grant recognition, and suggesting that the Union petition the Board for an election as that procedure "is the proper way to determine such questions."

In the meantime, on January 5, the Union did file a petition for a representation election (Case 9-RC-7096), describing the appropriate unit as consisting of "All truck drivers, warehousemen, production workers, maintenance men and yard men," excluding "office, clerical, supervisory and professional employees, guard, watchmen and all others excluded by the Act." In response to the Regional Director's request for a list of employees "falling within the alleged appropriate unit," the Respondent replied on January 9, attaching a "list of employees who perform duties in the general classifications listed in the petition."[2]

A representation hearing on the Union's petition was scheduled for February 3. When the parties met for the hearing, the Union was represented by Victor Smedstad, attorney; Business Agent Norman; and employees Marsh and Shafer. The Respondent was represented by Harvey Rector, labor consultant; General Manager Riley; Dispatcher Robert Dupree; Yard Foreman Roy Toops; and employees William Lynch and William Mason. At the outset of the representation proceeding, and before the Hearing Officer formally opened the hearing, Mr.

2. Included in the list of names, 15 in number, were Marsh and Alexander, as well as Henry Shafer and Roy Toops. At the hearing the parties stipulated that Toops was a supervisor; the Respondent asserted that both Marsh and Shafer were also supervisors.

Rector and Attorney Smedstad, together with the hearing officer, engaged in a discussion, following which the Union signed a request to withdraw its petition.

In this proceeding, Attorney Smedstad testified in some detail regarding this discussion, and, although other witnesses (Norman, Marsh, and Riley) also testified concerning this episode, their accounts do not materially vary from that of Smedstad. I accept Smedstad's testimony, principally on the ground that it is not contradicted and because he impressed me as the more likely, in view of his legal training and experience, to understand the somewhat technical aspects of the discussion. The findings which next follow are based upon his version.

Mr. Smedstad inquired of Mr. Rector if there was any possibility of entering into a consent election agreement. Rector replied there was not. The Hearing Officer then asked Rector whether he would stipulate that the Union was a labor organization within the meaning of the Act, and Rector replied he could not so stipulate, because, he said, the Union had been organized by supervisors of the Company and it would, therefore, be unlawful for the Company "to recognize any union that had been organized by supervisors." After some further discussion Rector agreed that the Union, as such, was a labor organization within the meaning of the Act, but stated that he wanted "to go on the record and make a record on the way in which this union was organized" and to show that "supervisors . . . coerced some of the employees into signing cards." Mr. Jack Baker, the Hearing Officer, then stated that the Union's showing of interest was not a matter to be litigated in the representation proceeding. The following exchange then occurred, as related by Smedstad:

> . . . Mr. Rector said, "You mean you are denying me the right to make a record, to have a record?" And Mr. Baker said, "Well, on this issue of how the union got its showing of interest, I will not hear this evidence."
>
> Mr. Rector said, "Well, if you are going to deny me the right of the record on this, then the Board can do what

it wants to. If it holds an election, the company will not bargain with the union."

Mr. Smedstad thereupon obtained a recess and discussed the situation with officials of the Union. Returning to the hearing room, he asked the Hearing Officer for a withdrawal form. This was signed by Smedstad, without objection from Mr. Rector. Later, before leaving the hearing room, Smedstad and Rector had a conversation, the substance of which was that under no circumstances would Rector enter into a consent election agreement, even if the Union obtained a new showing of interest, saying that "it was through the action of supervisors that they [the employees] signed up, and, therefore, we will not sit down and bargain with you."[3]

B. *The Refusal to Bargain and the Strike*

1. The Union's majority

Immediately following the conclusion of the February 3 meeting, Smedstad and Norman went to the Union's hall, where Smedstad drafted three documents: a recognition agreement which contained a clause whereby the Union agreed to refer to the Board the unit status of such persons as the parties could not agree were or were not supervisors; a document for employees to sign, stating, in part, that they wished the Union to represent them and that each "has voluntarily attended the meeting at which this is being signed" and each "has voluntarily signed" and "believes the company would not want us to join Truck Drivers Union, Local No. 413", and concluding with a request that the Respondent recognize and bargain with the Union while the employee and unit status of Marsh and Shafer was being determined by the Board (G. C. Exhibits 8, 9, and 10).

Norman called a meeting of the employees on February 4, at the union hall. Eleven employees attended, including Marsh

3. Rector did not testify.

and Shafer. Norman informed the employees of what had transpired at the scheduled hearing the day before and distributed copies of the three documents prepared by Smedstad to nine of those present, but not to Marsh or Shafer, stating that because their employee status was in question they could not participate in the meeting in any manner. All nine remaining employees, excluding Marsh and Shafer, signed the statement expressing their voluntary desire to be represented by the Union.

On February 6, Business Agent Norman took the documents referred to above to the Respondent's plant, and presented them to General Manager Riley. Norman credibly testified that, after showing the papers to Riley, the latter said he would refer the matter to Rector. Under date of February 8 Rector wrote to Norman, stating that the Respondent "refuses to recognize your union as bargaining agent because your membership includes supervisors . . . who influenced and dominated employees of the proposed unit." He added that for the Respondent to extend recognition "would be in violation of Section 8(a)(2) of the Act, because any signatures you may have obtained under this [supervisory] influence would not be legal." He further stated that "if there is a strike, at this time, both your union and the supervisors in question will be liable to suit for damages."

At the December 29 meeting 12 employees (assuming for present purposes that Marsh and Shafer are not supervisors) signed union authorization cards which were properly authenticated at the hearing by Norman.[4] At the February 4 meeting nine employees signed the document prepared by Smedstad acknowledging that they voluntarily desired the Union to represent them.[5]

4. These were: Richard Alexander, Frederick Baum, Homer R. Beckelheimer, Melvin Brice, Roy L. Hamilton, Gilbert Kountz, Norman LeVeck, Richard Marsh, Bill A. Martin, Floyd Ross, Henry Shafer, and John W. Thompson.

5. The employees signing were: Alexander, Beckelheimer, Brice, Hamilton, Kountz, LeVeck, Martin, Ross, and Thompson.

The complaint (Case 9-CA-4197) alleged, and the Respondent's answer admitted, that the following unit is appropriate within the meaning of Section 9(b) of the Act:

> All truck drivers, warehousemen, production and maintenance employees and yard men at Respondent's facility at 1850 Dunune Avenue, Columbus, Ohio, excluding office clerical employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

The parties stipulated that at all times material there were 10 employees in this unit.[6]

I find that at all times material the Union represented a majority in the appropriate unit.

2. The employee status of Marsh and Shafer

a. *Marsh*

Marsh was first employed by the Respondent as a truckdriver for approximately 3 years; in February 1965, he began working as a truss maker in the truss department. While employed in that capacity, he also drove a truck, operated a forklift, worked in the yard, and unloaded boxcars. He generally reported to work at 7:30 a.m. and punched the timeclock. According to Marsh's credited testimony, he spent an average of 90 percent of his time in the actual construction of trusses, while the balance of his working time was devoted to setting up jogs and other duties as set out above. He, as well as LeVeck, answered the telephone and quoted prices to customers from detailed price lists made available to them.

6. They further agreed that Toops was a supervisor. General Counsel contended that Marsh was nonsupervisory and therefore a member of the unit, whereas the Respondent contended that he was supervisory. With respect to Shafer, the Union took no position as to his unit status, the General Counsel reserved his position, while the Respondent contended Shafer was "mill superintendent." Counsel for the Respondent further stated Beckelheimer "became foreman in Shafer's place when Shafer resigned on February 6."

I credit Marsh's testimony that he was never advised by anyone in management that he had any supervisory authority as defined in Section 2(11) of the Act.[7]

The Respondent called several general contractors—William B. Luft, Walter Webb, and Joseph Betts—who testified to the effect that they (the general contractors) had been introduced to Marsh by members of Respondent's management, as the truss superintendent. Aside from the fact that some of their testimony, which need not here be detailed, did not impress me as worthy of credit, it is plain that the title conferred upon Marsh by his superiors when the latter introduced him to customers of the Respondent as the superintendent of the truss department, is entitled to little if any weight in determining his status.

Upon all the above I find that Marsh did not possess or exercise supervisory authority at any times here relevant. Accordingly I find he is to be included in the unit.[8]

7. General Manager Riley testified, in conclusionary terms, to the effect that Marsh was a supervisor. However, he admitted that Marsh had never been carried on any company records, such as the payroll records, as having a supervisory title, and that no notice was ever posted informing any of the Respondent's admitted nonsupervisory employees of Marsh's alleged supervisory status. William Dunfee, assistant manager, testified that he informed Marsh in March 1965, that he was truss superintendent as the successor of one John Phillips who had formerly been the truss superintendent and whom Marsh replaced. When Phillips held this position, he was paid a salary of $135 or $150 per week. When Marsh allegedly became truss superintendent he was then receiving an hourly rate of $2 and did not receive an increase in pay at that time. Later in the year, Marsh received an increase. When he last worked for the Respondent, he was being paid $2.30 per hour, plus time and one-half for work in excess of 40 hours per week.

The objective facts, the conclusionary nature of Riley's testimony and the admissions made by him and the obviously evasive demeanor of both Riley and Dunfee, convince me that they are not entitled to be credited unless their testimony is corroborated by reliable and creditable oral testimony or written documents.

8. See *N. L. R. B.* v. *Leland-Gifford Co.*, 200 F. 2d 620, 625 (C. A. 1), where the court observed: "Certainly it cannot be that an employer can make a 'supervisor' out of a rank-and-file

b. *Shafer*

As noted above, Shafer resigned on February 6, 1965. It is, therefore, unnecessary for the purpose of this proceeding to determine whether or not he occupied a supervisory position. In any case, the evidence is inconclusive.

3. The strike and its nature

As found above, the Union was the majority representative of the employees in the appropriate unit at all times here material. Paragraph 8 of the complaint (Case 9-CA-4197), alleged that the Union requested and thereafter continued to request, following February 6, that the Respondent bargain collectively with it. Paragraph 9 alleged that on or about February 8, and at all times thereafter, the Respondent refused and has continued to refuse to recognize and bargain in good faith with the Union by (a) refusing to grant recognition to it as the exclusive bargaining representative of the unit employees, and (b) refusing to meet with the Union to discuss rates of pay, wages, and other terms and conditions of employment. Paragraph 10 alleged that on February 15, "certain employees of Respondent employed in the said unit . . . ceased

employee simply by giving such an individual a title and theoretical power to perform some or all of the supervisory functions listed" in Section 2(11) of the Act. See also *Quincy Steel Casting Co., Inc.*, v. *N. L. R. B.*, 200 F. 2d 293-297 (C. A. 1), where the same court said that "the important thing is the actual duties and the authority of the employee, not his formal title." (Citing *Red Star Express Lines* v. *N. L. R. B.* 196 F. 2d 78, 79-80 (C. A. 2).) In reaching the above conclusions regarding Marsh's status, I have carefully considered the testimony of management representatives and the manager of Nugents-American Contractors, which organization on occasion supplies temporary labor to the Respondent, and Marsh's testimony about the manner in which he was involved in such procurement of temporary labor. I credit Marsh's testimony in this regard, and that of Mr. Dove, who in answer to a question on cross-examination by Counsel for the General Counsel, whether orders for temporary help "have also been signed by other employees of Linden Lumber other than Richard Marsh?" answered "Right."

work concertedly and went out on strike"; and paragraph 11 alleged that the strike described above "was caused and prolonged by the unfair labor practices of Respondent" previously described in paragraphs 5 and 9.

In its answer to this complaint the Respondent denied the pertinent paragraphs "for the good and following reasons": (a) with respect to the representation hearing, previously referred to, it was the Respondent's contention "that it could not legally recognize a union comprised of supervisors"; (b) it further stated that the claim of majority status was "based on the allegation that 4 employees, led by three supervisors, constitutes the majority of the employees of the respondent." The answer further alleged that no union "is the exclusive bargaining agent for the employees of respondent," and that the Union "requested recognition by sending the company a list of names which included a supervisor." Finally, the Respondent alleged that Region 9 of the Board "has made it clear that the respondent must bargain regardless of the supervisory issue."[9]

9. The Respondent, in the concluding paragraph of its answer in Case 9-CA-4197, alleged that it "has never refused to bargain with a legally constituted and designated or certified unit of its employees. Respondent does refuse to recognize its supervisors as union representatives because such a union or unit thereof would be contrary to law." In support of this affirmative defense the Respondent cites *Wells, Inc.*, 68 NLRB 545 (1946), in which the Board dismissed an allegation of violation of Section 8(5) of the Wagner Act on the ground that "the Union's majority was procured with the direct and open assistance of a supervisory employee" and thus did not "represent the free and untrammeled will of the employees and hence cannot be recognized as [a] valid majority." The Court of Appeals for the Ninth Circuit enforced the Board's order, *Wells, Inc.* v. *N. L. R. B.*, 162 F. 2d 457, but modified the portion thereof requiring the reinstatement of the foreman, found by the Board to have been discriminatorily discharged, who had been responsible for the recruitment of his subordinate employees into the union. In addition, the Respondent cites *Jack Smith Beverages, Inc.*, 94 NLRB 1401, where the Board ordered the disestablishment of an affiliated union which it found to have been supported and dominated by the employer, in violation of Section 8(a)(2) of the Act; and *N. L. R. B.* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 271 (C. A. 6), where the Court, following remand from the Supreme Court of the United States (332 U. S. 840), modified its prior order en-

As found above, Marsh is not a supervisor and, accordingly, is entitled to be and is included in the appropriate unit. The status of Shafer need not be passed upon for the purpose of this proceeding, inasmuch as he terminated his employment on February 6, and, in any event, his inclusion or exclusion could not affect the result.

Under date of February 8, Mr. Rector, the Respondent's labor consultant, replied to Norman's request for recognition which had been delivered to Rector on February 6, as follows:

> The company refuses to recognize your union as bargaining agent because your membership includes supervisors . . . who influenced and dominated employees of the proposed unit. This position was made clear by the company at the NLRB hearing February 3, 1967 in Case 9-RC-7096. Your union had the opportunity to prove its claims before NLRB but withdrew its petetion *(sic)*. Therefore, the company can not recognize your union so long as the supervisory influence exists. To do so would be in violation of Section 8(a)(2) of the Act.

Rector's answer to Norman's request continued that it was his understanding from the Company that the Union "threatened to strike." He added that "if there is a strike, at this time, both your union and the supervisors in question will be liable to suit for damages." Concluding, Rector stated that the Board "should decide this matter" but, in view of the fact that the Union had withdrawn its petition, the "NLRB is powerless to rule."

Attorney Smedstad, whose testimony I credit, gave the following answers to the questions on cross-examination by Mr. Rector:

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forcing an order of the Board, issued prior to the 1947 amendment of the Act, so as to set aside (in agreement with the Board's contention) those provisions of the previously enforced order of the Board directing the employer there involved to cease and desist from discouraging membership in the Foreman's Association of America, in any other manner interfering with its supervisory employees' efforts to bargain collectively through that organization, and to post appropriate notices with respect to these matters.

> Q. I have one question. Is it your testimony then that you actually withdrew the petition because you did not want to go through a long, lengthy litigation before the Board?
>
> A. Before the Board and before the Court of Appeals which would, from my experience, take a good two years or better.
>
> Q. I daresay, you are right; but that is the reason you withdrew your petition?
>
> A. That is correct.
>
> Mr. Rector: Thank you. No further question.
>
> Trial Examiner: You are excused, Mr. Smedstad.

Concerning the conference between Attorney Smedstad and the employees and Norman prior to the conclusion of the representation proceeding, Smedstad credibly testified that he advised the employees and Norman that "regardless of how it [the representation proceeding] turns out, it will be two years in all likelihood before you can sit down and bargain with this company. There is a possibility that through economic action, in the way of a strike, the company might be willing to sit down and bargain, without having to go through any election." His further testimony, which I credit, is that the employees and Norman, the union representative, told him that "it was their opinion that the employees were so highly irritated because of the manner in which the company was being run and the working conditions that all they would have to do would be to drop a nickel in the phone box and they would be out on the street right then and there." Smedstad thereupon told the union representatives and employees that it was necessary for them to stick together, and that if they felt the way they expressed themselves, he would ask the union president for authority to withdraw the petition. He then telephoned the union office and talked to Dale Mann, president of the Union, recited to him what the problem appeared to be, and received full authority to withdraw the petition if he deemed that action advisable.

At the subsequent private conference between Smedstad and Rector, the latter, according to Smedstad's credited testimony, referred to the fact that he had known Robert C. Knee, the attorney with whom Mr. Smedstad was associated, for a good many years. Rector further added, again according to Smedstad's credited testimony, that it had been the policy of his organization "that whenever the union has a 30 percent showing of interest that we are more than happy to enter into a consent agreement." Smedstad replied that he could assure Respondent that the Union had "well over 30 percent" in this situation, to which Rector retorted that it was his understanding from his investigation "that some supervisors have coerced some employees into signing cards." Smedstad rejoined that it was his understanding, as indicated by the exhibits to which reference has heretofore been made, that when the petition in the representation case was first filed, the Respondent submitted a list of 14 names to the Regional Office and advised that if the Union would agree to this list the Company would be willing to go through a consent election. To this, Mr. Rector rejoined: "Yes, that's when they didn't know what they were doing, and when I came in on the case, when I looked at that list, I found that the list was not correct. For example, there was one individual who was no longer working at the plant . . ." and "I understand that one or two people on here are supervisors."

Respondent's brief to the Trial Examiner consists of some four pages of argument, in which the following issues are raised:

1. Did the Hearing Officer deliberately refuse to go on the record so that Counsel for the Union would have grounds to file the unfair labor practice charge?
2. Why did the Union withdraw its petition?
3. Why did the Regional Director permit the withdrawal?
4. Why did the Hearing Officer refuse to go on the record?

The brief asserts that all of the testimony contained in the record creates a controversy "which was established by one fact only—the Hearing Officer denied the respondent benefit of record. In so denying the respondent his rights under the law, he set up a 'make weight' reason for the General Counsel, based upon a charge by the union, to issue a complaint seeking to force the respondent to bargain with said union without an election or due process of law. If the General Counsel is right and the statement of Rector is an unfair labor practice then the combined actions and conduct of the Hearing Officer, Counsel for the Union and the General Counsel constitute a conspiracy to defraud the respondent."[10]

I conclude that the evidence in this proceeding clearly establishes that the strike was caused by the unfair labor practices of the Respondent in refusing to recognize the Union and by its other unfair labor practices as above described. I find no merit whatever in the contention that the unit of employees (or the Union for that matter) was dominated by supervisors of the Respondent. By refusing to recognize and bargain with the Union as the exclusive representative of its employees, I find that the Respondent violated Sections 8(a)(5) and (1) of the Act, and that the strike which began February 15, was caused by the Respondent's unfair labor practices.

The parties agreed that the strike terminated on June 1, and all employees who desired to return to work were reemployed, with the exception of Marsh and Alexander. We turn then to the alleged individual discrimination against Marsh and Alexander.

10. While it seems unnecessary to make any comment upon these arguments, it may not be inappropriate to note that they are specious and, for the most part, the citations in support thereof are distinguishable or wholly inapposite.

C. *The Discrimination Against Marsh and Alexander*

1. Marsh

When the strike commenced on February 15, Marsh did not join in it for the reason that Norman had informed him that his status as an employee was still in question and, consequently, advised Marsh to continue working. Marsh did work until February 27 and then told General Manager Riley that the other employees who were working would not talk to him, and were giving him "dirty looks" and that one employee, Donald Alexander, was riding around with a German Shepherd dog in his truck. In consequence, Marsh told Riley that he did not think it was safe for him to continue working and that he had concluded he should go home. In response to Marsh's statement, Riley in substance stated that Marsh was "quitting"; Marsh, however, replied that he was "just going home until this union situation is straightened around to where I felt I was safe in the truss plant." Approximately a month later (about the latter part of March) Marsh returned to the plant and told Riley that, since matters seemed to have quieted down, he was ready to return to work. At this point I find, in accordance with the credited testimony of Marsh, that Riley told him he (Marsh) had quit.[11]

I find that Marsh did not quit on February 27, but, with Riley's consent, absented himself from work because of the conditions then prevailing. Moreover, I conclude that Marsh was, as an employee, a supporter of the strike from its inception, but, on advice of his union representative remained at work between February 15 and February 27. I further conclude and find that when Marsh, during the latter part of March, informed Riley that he was prepared to resume working inasmuch as the strike activities had apparently quieted down, Riley informed him that

11. A careful check of Riley's testimony reveals no denial by him of the foregoing testimony of Marsh.

he had quit, and, in effect, discharged him because he was sympathetic with the Union's cause.

Accordingly I find that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to permit Marsh to return to work when he offered to do so in the latter part of March. Moreover, I am persuaded and find that Marsh became an unfair labor practice striker when he ceased working on February 27.

2. Alexander

It is not disputed that Alexander, who was employed by the Respondent in August 1965, was at all times here material an employee of the Respondent and that he went on strike February 15 and continued to participate in it. About the end of May he applied, in company with other strikers, for reinstatement. General Manager Riley, under date of June 2, wrote the following letter to Alexander:

> We regret to inform you that we are unable to reinstate you in your job because of your participation in violence during the course of the strike.

Without undue lengthening of this Decision, I find, upon the basis of the testimony from the proceeding before me and the related testimony in the official record in the criminal proceeding brought against Alexander (which resulted in his acquittal) that the Respondent's defense with respect to Alexander is without merit.

Admittedly, Alexander was arrested during the strike and charged with assault. The matter came on for trial June 13, before the Municipal Court of Columbus, Ohio. By stipulation of the parties, the testimony of one Walter Lucas, one of the complaining witnesses against Alexander, as contained in the official transcript of the criminal proceeding brought against Alexander, was received in evidence as "a true, accurate and

correct copy of the transcript" of those proceedings.[12] Alexander was acquitted of the assault and battery charges brought by Lucas as well as by one Robert Smith, both of whom testified in the proceeding before me as witnesses for the Respondent. Riley, who wrote the June 2 letter to Alexander, refusing him reinstatement because of his alleged "participation in violence during the course of the strike," was not examined with respect to the basis of his knowledge of the assertion made in that letter.[13]

The incident upon which the Respondent relies for not reinstating Alexander occurred on Saturday, February 25. During the preceding week, as Alexander credibly testified, Smith "was blocking our picket line and started calling us names . . . and pulled off his coat and was going to fight," but that he never had any trouble with Lucas prior to February 25.

Smith and Lucas, both employees of Stoner Lumber Company, appeared at the Respondent's plant about noon on February 25, and, according to Smith's testimony on direct examination as a witness for the Respondent, the following occurred:

> Q. Could you explain what happened while you were out there?
>
> A. Well, we were sent out to pick up a forklift and, in the meantime, they were still using it, around noon, so we went on over to the Tip-Top to wait until they got finished.

12. Rector's objection that the transcript had "no bearing upon this case" was overruled; in support of his objection he characterized the transcript of the Municipal Court proceeding as "a civil court transcript or record of the testimony that was taken" and added that the June 2 letter to Alexander was based upon "the information that reached the employer that he [Alexander] was involved in it [the fracas]" and "that he was refused" reinstatement for that reason.

13. The Respondent produced as witnesses in support of the Respondent's refusal to reinstate Alexander, only the witnesses Lucas and Smith. Their testimony not only does not establish that they gave any information about the "fracas" to Riley, but for reasons briefly stated hereafter, I do not credit their testimony implicating Alexander.

Q. By "we," who do you mean?
A. Me and Mr. Lucas.
Q. Okay, continue. What happened then?
A. Well, we went into the Tip-Top Club—
Trial Examiner: You went in where?
The Witness: The Tip-Top Club, 3-C Highway. We had us a drink in there, when these fellows all came in and jumped us.
After that, we proceeded to go back and get the forklift and took it back to the Stoner Lumber Company.
Q. What happened then at the Tip-Top?
A. There were six or seven fellows came in and jumped us, and beat us up pretty good, and after that we went on back over to the lumber company. They called the police.
Q. You say six or seven fellows jumped you?
A. That's right.
Q. Did you recognize any of them?
A. Just two of them.
Q. And who were the two you recognized?
A. Richard Alexander and Bill Martin, William Martin.
Q. Did they strike any blows?
A. Yes, they did.
Q. Now, were these two, Alexander and Martin, arrested?
A. Well, we filed charges against them. They were arrested, yes, sir.
Q. And did you have a trial?
A. Yes.
Q. In court?
A. Yes, we did.

On cross-examination, Smith testified as follows:

Q. Did you testify at the trial on the charges brought against Richard Alexander, by both you and Mr. Lucas?
A. Yes, I did.
Q. Were the charges which were brought against Mr. Alexander—Based on those charges, was he found not guilty?

A. I believe they found him not guilty.

Q. And do you know from your own knowledge that the charges Mr. Lucas brought against Mr. Alexander were also dismissed?

A. As far as I know.

Lucas, also a witness for the Respondent, testified on direct examination as follows:

Q. Were you out at the Linden Lumber Company during the strike?

A. Yes, sir.

Q. Could you tell us what happened?

A. Well, they sent me with Bob Smith, the forklift operator, out there to haul this thing down to our yard. There was a lot of shuffling going on out there. They couldn't get the trailer loaded right away. They were busy doing something else, so we walked over to the tavern and we had a highball, and we were sitting there drinking and talking and discussing things. We were close to the front door and this group of guys come in.

Well, naturally, we turned. I never thought anything about it. They walked by us, and we kept on talking. Suddenly, there was a fracas and they had Bob on the floor, and Martin and Alexander were beating him and two other guys were there close, and I stood up. Bob got away from them. They were going toward the back door and I turned to see what had happened, and someone struck me in the back of the head with something. It left three cuts in the back of my head.

When I turned around, there were these fellows standing there, and somebody hit me in the ear, and I saw this one big fellow that I had seen on the sidewalk there with the rest of them fellows. He was coming at me, and I pulled my pocketknife out and told him that if he struck me I was going to use it on him, and someone hollered, "He's got a knife, let's go," and that's all. They left.

Q. Was that, then the end of the fight?

A. Yes, sir.

Trial Examiner: What did you do next?

The Witness: We went out the back door, the way we went in.

Trial Examiner: Then where did you go?

The Witness: Over to the Linden Lumber Company.

Trial Examiner: And got the forklift?

The Witness: Yes, sir. Well, we got the forklift and took it back to our yard. Of course, they called the police.

Trial Examiner: Who called the police?

The Witness: Someone at Linden Lumber. I don't know who did. The cruiser came up and took a report on what happened. We took the forklift back to our yard, and our boss took us down to the hospital and to the police department to file assault and battery charges against Alexander and Martin, that's the only ones I knew.

Trial Examiner: You had known Alexander and Martin?

The Witness: I didn't know them real well. I had seen them in the line-up, walking along the sidewalk.

Trial Examiner: You had been out to the Linden Lumber Company before this Saturday morning during the strike?

The Witness: I don't remember if I had been in there or not, before that, during the strike.

Q. Now, then, were you down at the court hearing on these charges?

A. Yes, sir.

Q. And did you testify?

A. Yes, sir.

Q. Did you know Melvin Bice?

A. Yes, sir, by acquaintance and seeing him during the strike. I don't know him personally.

Q. Did you observe him down at the court house?

A. Yes, sir.

Q. Was he in the Tip-Top when this assault went on?

A. No, sir.

On cross-examination, Lucas testified, in pertinent part, as follows:

Q. Now, you say, Mr. Lucas, that you testified. Was this relative to the assault and battery charges you filed against Mr. Alexander?

A. Yes.

Q. Mr. Lucas, do you personally know Mr. Alexander?

A. No, sir.

Q. Had you, prior to going into the Tip-Top Cafe on the day of the altercation, prior to that time seen Mr. Alexander?

A. Yes, sir.

Q. Where had you seen Mr. Alexander?

A. On the sidewalk . . . at the Linden Lumber Company.

Q. You were not really sure who it was that hit Mr. Smith and knocked him down?

A. That is right.

Q. You are not sure?

A. I seen Alexander and Martin beating on him after I turned around and saw him on the floor.

Q. How many guys were on top of Mr. Smith?

A. Martin, Alexander, and two other fellows were there close. I don't know if they had been or not, it all happened in a flash.

Q. You didn't know who had knocked Mr. Smith down?

A. I know Alexander and Martin were beating on him then.

Q. You don't know who had knocked Mr. Smith down?

A. I don't know who knocked him off the stool.

Q. Mr. Lucas, didn't you testify at the hearing on the assault and battery charges that you only recognized one of the fellows who was hitting Mr. Smith while Mr. Smith was on the floor?

A. I don't remember that.

Q. You don't remember testifying in that manner?

A. No.

Q. Isn't it a fact that you only recognized one of the fellows that was hitting Smith, and that was Martin, Bill Martin?

A. No, it isn't.

Mr. Smedstad: I have some questions.

Q. Mr. Lucas, you testified here that you cannot swear that it was Mr. Alexander that hit you, is that right?

A. That's right. I was hit from the back.

Q. And at the hearing that was held on the assault charges that you brought, isn't it correct that on examination from at least two different attorneys that you testified that you did not know whether or not it was Alexander? Isn't that correct?

A. I think probably.

Q. Were you under oath at that hearing?

A. Yes.

Q. And under oath you testified that you really didn't know whether it was Alexander or not?

A. I think so.

In the criminal proceeding, brought by Lucas and Smith against Alexander, the following testimony by Lucas is pertinent, in my opinion, relating to his and Smith's visit to the Respondent's premises on February 25:

Q. Did you notice anything unusual about the premises of Linden Lumber Company?

A. I noticed there was a group of guys milling around, yes, sir.

Q. Could you tell what they were doing?

A. Some of them were sitting in cars, some of them just standng around talking.

Q. Notice any signs?

A. At that particular day, no sir.

Q. All right. Did you recognize any of the men there?

A. Yes, sir.

Q. Who did you see?

A. I saw those two fellows there.

Q. Which two fellows?

A. Mr. Martin and Mr. Alexander.

Q. Had you known Mr. Martin and Mr. Alexander prior to that day?

A. Only just to see them around the Linden Lumber Company.

Q. Had you gone there previously?

A. Many times.

Q. Did you know them by name?

A. No, sir.

Q. Did you pick up the forklift at that time?

A. No.

Q. Why didn't you?

A. Well, the yard men were busy unloading the truck, so we backed the trailer into the loading dock and the group of fellows out there cursing and one thing and another—

Q. Cursing?

A. Yes, sir.

Q. Were they cursing at you?

A. I think so.

Q. Do you know why they were cursing at you?

A. I have an idea, because we were there. But we weren't doing any of their work.

Q. You mean it was a labor problem?

A. That's what I think.

Q. Where did you leave the truck?

A. In the Linden's yard.

Q. Where did you go from there?

A. We went over to a grill.

Q. You mean you and Mr. Smith?

A. Yes, sir.

Q. Why did you go over there?

A. Just to get out of their sight. We didn't want to create any disturbance. So, we walked away until the yard men had time to load this lift for us. They said it would be about a half hour or so.

Q. What did you do when you went over to the grill?

A. We got a highball, were sitting there talking.

Q. What happened then?

A. Well, we saw this group of fellows come in the door . . . I'd say from five—four or five—to seven, just a group of guys walking in the door.

Q. Did you recognize any of them?

A. No, sir; I didn't recognize them as their names. I know these two fellows . . .

Q. You mean Mr. Martin and Mr. Alexander?

A. Yes, sir. . . . Well, first thing I knew, they had Mr. Smith on the floor.

Q. How did he get there?

A. This Martin had hit him and another fellow; I don't know the other guy.

Q. What happened after Mr. Smith was struck?

A. I was struck at the back of the head, some instrument or something. I don't think anybody could have done it with their fist.

Q. Do you know who struck you?

A. Mr. Alexander.

Q. What happened then? What did you do?

A. Well, I started—I was dazed. I was trying to get off the stool, and I was struck again here two places. Broke my glasses and burst my ear inside. I had to have it sewed up, eight stitches in the back of my head. . . .

Q. Did you go to the hospital directly from the tavern?

A. No; we took the forklift back to the yard and came to the police station.

Q. In other words, you went back to the Linden Lumber Company?

A. Went back to the Linden Lumber Company; yes, sir.

Q. Did you see Mr. Alexander or Mr. Martin over there?

A. Yes, sir.

Q. Did you have any discussion with them at that time?

A. The police officer got Mr. Alexander and brought him inside, the police sergeant.

Q. Did you call the police?

A. They called them at Linden Lumber, someone I don't know.

Q. You don't know who called the police?

A. No, sir; I think it was probably the president of the company, Mr. Riley.

On cross-examination by counsel for defendants Alexander and Martin in the Municipal Court proceeding, Lucas gave the following testimony:

Q. In your prior trips over to Linden Lumber, did you notice this group of fellows milling around, as you said, around the gates?

A. On a couple occasions; yes, sir . . .

Q. All right. How long have you been driving a truck?

A. Twenty-six years.

Q. In this twenty-six years, how many times would you say that you've been to lumber companies or different places?

A. Oh, gee, that's my job. Every day.

Q. Have you ever seen groups of fellows milling around any places that you'd been before?

A. Yes, sir.

Q. Do you know why they were there?

A. Only what I hear.

Q. What do you generally hear when a group of fellows are standing around?

A. Well, it could be a lot of things.

Q. What?

A. Could be foreman . . . labor dispute; could be a personal grudge against the foreman. . . .

Q. Do you know what a picket line is?

A. I'd say so.

Q. Do you have any instructions on what you're supposed to do when you encounter a picket line?

A. Yes; but this was not a picket line.

Q. Oh, it's not?

A. No. There wasn't no union connected, as far as I know. The company was union, and the men weren't union, as far as I know.

Q. How do you know that?

A. Only what I hear, I say.

Q. Who'd you hear that from?

A. Different fellows; I mean Linden Lumber themselves, representatives of Linden Lumber. And my superiors at Stoner.

Q. So, your superiors told you that this group of fellows weren't a picket line?

A. True.

Q. Did you see Smith pull a knife?

A. No.

Q. Did you pull a knife?

A. Yes.

Q. When did you pull a knife?

A. After I got enough bearings to get on my feet and saw this other guy coming at me.

Q. Who is the other guy?

A. I don't know. He was a big husky fellow. I wouldn't know who he was. I pulled this knife out of my pocket, and I said, "If you hit me one more time, I'll be forced to use it," and I didn't even have it open.

Q. Okay. Now, you said that you were struck from behind.

A. That's right.

Q. Did you see the man strike you from behind.

A. I saw this group of guys come in through the door. When I turned around after the scuffle here, I didn't see this Martin. I mean, Alexander. So, I never saw him hit me, no, but I assumed that it was him . . .

Q. There were anywhere from four to seven guys that could have thrown it?

A. That's right.

Q. You picked Alexander.

A. That's who the man said it was, Mr. Smith.

Q. Well, Smith said that's who hit you?

A. That's true.

On re-cross-examination in that proceeding, Lucas testified:

Q. Did you see Mr. Alexander strike Mr. Smith?

A. No, sir; I can't say that I did.

Q. Did you say the police arrived and then took Mr. Alexander and Mr. Martin down to the police station right then?

A. No, sir; I did not say that.

Q. Do you know when the police took Mr. Martin and Mr. Alexander to the police station?

A. No, sir.

Before me Smith, recalled by the Respondent as a rebuttal witness, testified that he did not have a knife when the altercation occurred at the Tip-Top Cafe. Lucas, on rebuttal, answered to the same effect. He was not then asked whether he had a knife; however, in the Municipal Court proceeding he testified that he had with him, on February 25, "a Boy Scout knife," which he did not open but "had it out of my pocket, though."

Where the testimony of Lucas and Smith, on the one hand, differs from that of Alexander, I credit the latter.[14]

I find that the Respondent had no basis in fact for believing Alexander was a participant in violence to the extent that he is, by reason thereof, barred from reinstatement. Moreover, I find that the reason advanced by the Respondent for refusing him reinstatement is pretextuous and, therefore, violative of Section 8(a)(3) and (1) of the Act.

D. *Concluding Findings of Fact and of Law*

Upon the basis of the foregoing findings of fact I make the following concluding findings and conclusions of law:

1. At all times here material the Union has been and now is the exclusive representative of the employees in the appropriate unit heretofore found.

2. The Respondent by the actions of its representative, Labor Consultant Rector, at the February 3 meeting, and on subsequent occasions as previously found, as well as by the actions of General Manager Riley, unlawfully refused to bargain with the Union as the exclusive representative of its employees in the unit found appropriate, thereby violating Section 8(a)(5) and (1) of the Act.

3. The strike which commenced on February 15, was caused by the aforesaid unfair labor practices of the Respondent.

4. Richard Marsh was at all times here relevant an em-

14. Melvin Bice, a striker who was reemployed and was working for the Respondent at the time of the hearing, credibly testified that he went to the Tip-Top Cafe with Alexander and Martin; that Smith, when Martin "got up and . . . went over . . . to talk to Smith" "jumped up with a knife in his hand and Bill Martin hit him, and they got into a fight." He further testified, and I credit him, that Alexander made no physical contact with either Lucas or Smith. Martin admitted that he hit Smith "a couple or three times" when Smith "turned around with a knife" as Martin "asked him [Smith] to respect our picket line . . . He further testified, and I believe him, that he did not see Alexander attempt to or hit either Smith or Lucas, although he readily admitted that he "was busy" at the time with Smith.

ployee of the Respondent and, when he ceased working on February 27, joined the strike and thereby became an unfair labor practice striker. When he sought to return to work during the latter part of March, the Respondent independently violated Section 8(a)(3) and (1) of the Act by refusing to reinstate him upon the ground, which I find lacking in merit, that he had quit on February 27.

5. I find that, for the reasons heretofore stated, Alexander was refused reinstatement for discriminatory reasons and not because he had allegedly participated in acts of violence during the course of the strike.

6. The aforesaid unfair labor practices are unfair labor practices burdening and affecting commerce within the meaning of Section 2(6) and (7) of the Act.

IV. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, as alleged in the complaint in this consolidated proceeding, I shall recommend that it cease and desist therefrom and take the necessary affirmative action to effectuate the policies of the Act.

Since the Respondent unlawfully refused to reinstate Marsh on February 27 and Alexander on June 1, when all the other strikers were upon application reinstated, it will be recommended that the Respondent offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements in order to provide work for them. It will also be recommended that the Respondent make them whole for any loss of pay they may have suffered by reason of the Respondent's discrimination against them, by paying to each of them a sum of money equal to the amount he normally would have earned as wages from the date the unconditional application was effective, to the date

of the Respondent's offer of reinstatement, less his net earnings during said period. The amount of backpay due shall be computed according to the Board's policy set forth in *F. W. Woolworth Company*, 90 NLRB 289, with interest on backpay computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716. Payroll and other records in possession of the Respondent are to be made available to the Board, or its agents, to assist in such computation and in determining the right to reinstatement.

It will also be recommended that the Respondent bargain collectively with the Union and, in view of the nature of the unfair labor practices which I have found to have been committed, I shall further recommend that the Respondent cease and desist from in any manner interfering with its employees' rights guaranteed under Section 7 of the Act.

RECOMMENDED ORDER

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in this proceeding, it is recommended that the National Labor Relations Board, pursuant to Section 10(c) of the National Labor Relations Act, as amended, order that the Respondent, Linden Lumber Division, Summer & Co., Columbus, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Truck Drivers Union Local No. 413, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or in any other labor organization, by discriminatorily failing or refusing upon their unconditional request to reinstate any of its employees who have engaged in a strike and are lawfully entitled to reinstatement, or by discriminating against its employees in any other manner in regard to hire or tenure of employment or any term or condition of employment.

(b) Refusing to bargain with the above-named Union as the exclusive representative of its employees in the unit found to be appropriate for the purposes of collective bargaining.

(c) In any other manner interfering with, restraining, or coercing its employees in the evercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to Richard E. Marsh and Richard L. Alexander immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Notify the said employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Upon request, bargain collectively in good faith with the above-named Union as the exclusive representative of the employees in the unit heretofore found appropriate, concerning rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(d) Preserve and, and upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due and to analyze reinstatement rights under the terms of this Recommended Order.

(e) Post at its premises in Columbus, Ohio, copies of the attached notice marked "Appendix."[15] Copies of said notice, to be furnished by the Regional Director for Region 9, after being duly signed by a representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 9, in writing, within 20 days from the date of receipt of this Decision, what steps the Respondent has taken to comply herewith.[16]

15. In the event that this Recommended Order is adopted by the Board the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

16. In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 9, in writing within 10 days of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

Notice To All Employees

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in or activity on behalf of Truck Drivers Union Local No. 413, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discriminatorily failing or refusing to reinstate any of our employees or by discriminating in any of other manner in regard to hire or tenure of employment or any term or condition of employment, except as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL offer Richard E. Marsh and Richard L. Alexander immediate and full reinstatement to their former positions, without prejudice to seniority and other rights and privileges.

WE WILL make the said Marsh and Alexander whole for any loss of pay suffered as a result of refusing to reinstate them.

WE WILL, upon request, bargain collectively in good faith with the above-named Union, as the exclusive bargaining representative of our employees in the unit found by the National Labor Relations Board to be appropriate for the purposes of collective bargaining, with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody it in a signed agreement. The bargaining unit is:

All truck drivers, warehousemen, production and maintenance employees and yard men at the Re-

spondent's facility at 1850 Dunune Avenue, Columbus, Ohio, excluding office clerical employees, guards, and supervisors as defined in the Act.

All our employees are free to become, remain, or refrain from becoming or remaining, members of the above-named Union or any other labor organization.

LINDEN LUMBER DIVISION, SUMMER & CO.
(Employer)

Dated By
(Representative) (Title)

Note: We will notify the employees to be reinstated, if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 2407, Federal Office Building, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513—684-3663.

APPENDIX H

TRIAL EXAMINER'S SUPPLEMENTAL DECISION

IVAR H. PETERSON, Trial Examiner: On January 26, 1968, I issued my Decision in this proceeding, finding that the Respondent had engaged in unfair labor practices violative of Section 8(a)(1), (3), and (5) of the Act. On April 15, the Board issued an Order, following receipt of exceptions and briefs, remanding the proceeding to me "for the purpose of making findings of fact concerning (1) the supervisory status of Henry Shafer, and (2) if a supervisor, the impact of Shafer's conduct on the validity of the Union's majority, and for making any other or additional findings and recommendations based on the record, supplemented, if necessary, by evidence received at a reopened hearing."

Having further considered the matter, I conclude that it is not necessary to take additional evidence at a reopened hearing inasmuch as the record as presently constituted is adequate to permit the making of findings regarding the supervisory status of Shafer and the impact of his conduct on the validity of the Union's majority.

In my original decision I stated that it was unnecessary to determine whether Shafer was a supervisor and, further, that the evidence on this issue was inconclusive. Upon a further review of the record, I am now of the opinion that the evidence sufficiently establishes that he was a supervisor, and I so find. Aside from the conclusionary testimony of General Manager Riley and Assistant Manager Dunfee to the effect that Shafer was the mill foreman or mill superintendent and "supervised" two men, Ross and Beckelheimer, there is credible testimony of Robert Dupre, the dispatcher, and William Mason, a truck-driver who on occasion worked in the mill, that Shafer was the mill superintendent and a supervisor. Moreover, Smedstad, the Union's attorney, testified that on February 3, 1967, prior to

the meeting concerned with the Union's representation petition, he discussed with Shafer the latter's duties and, after he (Smedstad) had submitted to the hearing officer a written request to withdraw the petition advised Shafer "that I thought the chances were good that the Labor Board would conclude that he was a "supervisor." Smedstad further testified that he based his view in part upon the fact that Shafer, unlike Marsh, "had gotten a written set of instructions outlining what his supervisory authority was." Considering all the testimony regarding Shafer's status, I am persuaded that it sufficiently establishes that he had and exercised supervisory authority, and I so find.

As to the second issue on which the Board has ordered that I make findings in the event I determine Shafer was a supervisor —"the impact of Shafer's conduct on the validity of the Union's majority"—the conclusion I reach is that the Union's majority is in no way tainted or impaired by reason of Shafer's having signed an authorization card or by any other conduct on his part as disclosed by the record.

The initial contact with the Union was made on December 28, 1966, by William Martin, then an employee, who telephoned Dow Norman, business agent and organizer of the Union. The next day Norman met with 11 employees and Shafer at a restaurant. All of them including Shafer, signed authorization cards. Norman credibly testified and I find that Shafer did not at this meeting address the employees. The Union made its demand for recognition by letter dated January 3, 1967, and filed its petition on January 5. There is no evidence that Shafer solicited any employees to sign authorization cards or to support the Union. Dispatcher Dupre did testify that Shafer, during the organizational period, "told me he hated Bill Dunfee, and he was going to get Dunfee, and that they were going to get the union in or he was going to quit." Yard Foreman Toops testified that Shafer talked about the Union and in that connection said, "they were out to get Bill Dunfee." Mason, a truckdriver, who did not attend the organizational meeting on December 29, and did not sign an authorization card, testified Shafer stated to

him, "We are trying to get a union in here," but said nothing about Dunfee.

As heretofore found, Organizer Norman met with employees on February 4, the day after the aborted representation hearing at which Mr. Rector, on behalf of the Respondent, refused to recognize the Union or consent to an election, claiming that supervisors had coerced employees into signing authorization cards. Nine employees, as well as Shafer and Marsh, the two card signers whose status was in dispute, were present. Norman at that meeting stated that since their status was in question Shafer and Marsh "would not be allowed to participate in this movement" and asked that they leave. The nine employees remaining were asked to read a document, which they then signed, affirming that they desired the Union to represent them, that each "has voluntarily signed" the document, and that each "believes the company would *not* want us to join" the Union. This document, together with the Union's request for recognition and a proposed recognition agreement, were given by Business Agent Norman to General Manager Riley on February 6. For the Respondent, Rector replied on February 8, refusing to recognize the Union, asserting that the Union's membership "includes supervisors . . . who influenced and dominated employees of the proposed unit," a position made clear by the company at the NLRB hearing February 3, 1967," and further stating that "the company can not recognize your union so long as the supervisory influence exists." After receipt of this letter Norman, on February 9 or 10, called a meeting of the nine employees who on February 4, had signed the statement affirming their voluntary adherence to the Union, at which they read Respondent's February 8 letter and Norman explained that it meant that Respondent was refusing to accept the Union as the employees' bargaining agent. A strike vote was taken, by secret ballot, with the result that the nine employees voted unanimously to strike. All of them, except Robert Beckelheimer, joined in the strike which began on February 15 and picketed the Respondent's premises.[1]

To summarize, I find that Shafer, a supervisor, attended the initial organizational meeting of employees on December 29, 1966, and signed an authorization card. There is no evidence, however, that he solicited employees or otherwise enlisted their support of the Union. He did tell one employee, Mason, that an effort was being made, which he supported, "to get a union in here"; Mason did not sign a card or support the Union. At the February 4 meeting Shafer, as well as Marsh, was told by Business Agent Norman that, in view of the Respondent's contention that he was a supervisor, he could no longer participate in union activities, and he and Marsh were asked to leave the meeting. Thereafter, the remaining nine employees signed a statement affirming that they voluntarily desired the Union to act as their collective-bargaining representative, and later voted by secret ballot to strike and all but one did engage in the strike. Assuming that an inference of supervisory influence in the procurement of authorization cards at the initial meeting on December 29, 1966, might be drawn from the presence of Shafer at that meeting, I am of the opinion that such an inference is negated by the subsequent action of the rank-and-file employees, after Shafer had been told in their presence that he could no longer participate, in affirming their designation of the Union on February 4, and, after Shafer quit his employment, unanimously voting to strike. Accordingly, I find that the Union's majority status is not impaired or tainted by any conduct of Shafer.

Except with respect to my original findings that it was unnecessary to determine Shafer's supervisory status and that in any case the evidence relating thereto was inconclusive, which necessarily are modified as set forth in this Supplemental Decision, I adhere to the findings, conclusions and recommendations contained in my original decision herein, issued January 26, 1968.

1. Beckelheimer quit on February 19. According to the Respondent, Beckelheimer took Shafer's position when Shafer quite on February 6. According to Yard Foreman Toops, Shafer told him the morning of February 4 that the Union "sold us down the river," turned in his keys to Dunfee, and stated that he quit.

APPENDIX I

RELEVANT PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, 29 U. S. C. § 151, *et seq.*

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives or his employees, subject to the provisions of section 9(a).

* * * * *

Sec. 9. (a) Representative designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

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